United Nations A/CN.4/574

General Assembly

Distr.: General
10 August 2006
English
Original: French

International Law Commission
Fifty-eighth session
Geneva, 1 May-9 June and 3 July-11 August 2006

Eleventh report on reservations to treaties

By Mr. Alain Pellet, Special Rapporteur

06-47955 (E) 061206 151206

Contents

		Paragraphs	Page
I.	Introduction	1–57	3
	A. Eighth report on reservations to treaties and the outcome	2–15	3
	1. Consideration of the eighth report by the Commission	2–5	3
	2. Consideration of chapter VIII of the 2003 report of the Commission in the Sixth Committee	6–15	4
	B. Ninth report on reservations to treaties and the outcome	16–26	7
	1. Consideration of the ninth report by the Commission	16–17	7
	2. Consideration of chapter IX of the 2004 report of the Commission in the Sixth Committee	18–26	7
	C. Tenth report on reservations to treaties and the outcome	27–43	9
	1. Consideration of the tenth report by the Commission	27–31	9
	2. Consideration of chapter X of the 2005 report of the Commission in the Sixth Committee	32–43	10
	D. Recent developments with regard to reservations to treaties	44–56	13
	E. General presentation of the eleventh report	57	19
II.	Formulation and withdrawal of acceptances and objections	58–180	20
	A. Formulation and withdrawal of objections to reservations	58–180	20
	1. Freedom to make objections	60–86	20
	2. Procedure for the formulation of objections	87–144	30
	(a) Form of an objection	95–111	34
	(b) Confirmation of objections	112–124	40
	(c) Time at which an objection may be raised	125–144	45
	3. Withdrawal and modification of objections to reservations	145–180	52
	(a) Form and procedure for withdrawing objections	152–156	55
	(b) Effects of the withdrawal of an objection	157–160	57
	(c) Effective date of withdrawal of an objection	161–168	58
	(d) Partial withdrawal of objections and its effects	169–175	61
	(e) Widening of the scope of an objection to a reservation	176–180	63

I. Introduction[1]

1. The seventh report on reservations to treaties presented a brief summary of the Commission's earlier work on the subject (A/CN.4/526, paras. 2-47). This seemed appropriate since the Commission was entering a new quinquennium. The main conclusions drawn from the consideration of the seventh report by the Commission and by the Sixth Committee of the General Assembly were presented in the eighth report on reservations to treaties (A/CN.4/535, paras. 2-16). Reverting to that practice, this year's report summarizes briefly the lessons that can be drawn from consideration of the eighth, ninth and tenth reports by the Commission and by the Sixth Committee of the General Assembly before proceeding to give a brief account of the main developments in the area of reservations that have occurred during recent years and have come to the attention of the Special Rapporteur.

A. Eighth report on reservations to treaties and the outcome

1. Consideration of the eighth report by the Commission

2. At its fifty-fifth session in 2003, the Commission adopted 11 draft guidelines presented by the Special Rapporteur in the second part of his seventh report relating to withdrawal and modification of reservations (A/CN.4/526/Adds.1 and 2), which had already been referred to the Drafting Committee during the Commission's fifty-fourth session but which, owing to lack of time, the Committee had been unable to consider during that session (A/CN.4/535, para. 6), together with the corresponding commentary.[2] The Commission thus continued to fill in the gaps in part III of the Guide to Practice having to do with the formulation and withdrawal of reservations, acceptance and objections.[3] The Commission also referred to the Drafting Committee the draft guidelines presented in the Special Rapporteur's eighth report relating to withdrawal and modification of interpretative declarations.[4]

3. Regarding the issue of the enlargement or widening of the scope of a reservation, most members of the Commission were in favour of the draft guideline proposed by the Special Rapporteur,[5] bringing the solution to this problem into line with that of late formulation of a reservation. Nevertheless, some members of the

---

[1] The Special Rapporteur would like to express his special thanks to Daniel Müller, doctoral candidate at the Université Paris X-Nanterre and researcher at the Nanterre International Law Centre for his especially useful assistance in the drafting of this report. It is based, in particular, on the commentary to articles 20 and 21 of the Vienna Conventions on the Law of Treaties by D. Müller in Olivier Corten and Pierre Klein (eds.), *Les Conventions de Vienne sur le droit des traités: Commentaire articles par article* (Brussels, Bruylant, to be published). Some developments in the present report are also based on the commentary to articles 22 and 23 prepared by the Special Rapporteur (in collaboration with William Schabas in the case of article 23), which will appear in the same publication.

[2] *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), para. 368.

[3] See the provisional plan of the study presented by the Special Rapporteur in his second report (A/CN.4/477, para. 37); this plan was also included in the seventh report (A/CN.4/526, para. 18).

[4] Draft guideline 2.4.9 (Modification of interpretative declarations), 2.4.10 (Modification of a conditional interpretative declaration), 2.5.12 (Withdrawal of an interpretative declaration) and 2.5.13 (Withdrawal of a conditional interpretative declaration) (A/CN.4/535, paras. 49-68).

[5] Draft guideline 2.3.5 (Enlargement of the scope of a reservation) (A/CN.4/535, para. 46).

Commission disagreed with the proposal, arguing that it could jeopardize legal certainty and would be contrary to the definition of reservations contained in the 1969 Vienna Convention on the Law of Treaties.[6] Finally, following a vote, the draft guideline was also sent to the Drafting Committee and the Commission decided to request the comments of States on the issue.[7]

4. The draft guidelines on the definition of objections to reservations presented in the second part of the eighth report (A/CN.4/535/Add.1) elicited a critical[8] and fruitful exchange of views, particularly on the issue of the intention of the objecting State and the effects they purported to produce. The Special Rapporteur took note of these debates and proposed a more neutral formulation of the definition of objections. Nevertheless, the corresponding draft guidelines were not referred to the Drafting Committee and the Special Rapporteur proposed to give the matter further thought in the following report.[9]

5. Owing to lack of time, the Drafting Committee was unable to consider the draft guidelines referred to it by the plenary Commission during its fifty-fifth session.

2. Consideration of chapter VIII of the 2003 report of the Commission in the Sixth Committee

6. Chapter VIII of the Commission's report on the work of its fifty-fifth session was devoted to reservations to treaties.[10] As usual, a very brief summary of the topic was provided in chapter II[11] and the "specific issues on which comments would be of particular interest to the Commission" were set out in chapter III. As regards reservations to treaties, the Commission solicited the observations and comments of States on two points: first, the Commission asked States for their views on objections to reservations and for specific examples of their usual practice, in order to supplement its information in relation to the definition of and reasons for objections;[12] second, the Commission requested the comments of States on draft guideline 2.3.5 (Enlargement of the scope of a reservation), which had elicited divergent views within the Commission.[13]

7. Concerning enlargement of the scope of a reservation, some delegations were of the view that there were differences between enlargement of the scope of a reservation and late formulation of a reservation and that the Commission should exclude the possibility of States enlarging the scope of a reservation so as not to jeopardize legal certainty.[14] However, most delegations stated a preference for bringing the rules for enlargement of the scope of a reservation into line with those

---

[6] *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), paras. 353-354.

[7] See paras. 6 and 7 below.

[8] See also the ninth report on reservations to treaties (A/CN.4/544, paras. 6-11).

[9] See para. 17 below.

[10] *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), pp. 148-259.

[11] Ibid., para. 18. The Special Rapporteur continues to have grave doubts about the usefulness of these "summaries", which provide little information and risk giving readers in too much of a hurry a pretext for not referring to the pertinent chapters.

[12] Ibid., paras. 34-38.

[13] Ibid., para. 39.

[14] Austria (A/C.6/58/SR.19, para. 97); Greece (A/C.6/58/SR.20, para. 53).

already elaborated by the Commission for late formulation of a reservation.[15] It was underlined that such enlargements did not necessarily constitute an abuse of rights by the reserving State, but could be made in good faith and might even be necessary in order to take into account new constraints resulting, for example, from changes in the internal law of the State concerned.[16]

8. Regarding objections to reservations and the definition of objections, different delegations had very divergent views on almost all the elements of the proposed definition.

9 According to an extreme view, it was not necessary to include a definition of objections in the Guide to Practice, since article 20, paragraphs 4 (b) and 5, and article 21 of the 1969 Convention on the Law of Treaties were sufficient in that regard.[17]

10. However, the choice made by the Special Rapporteur and endorsed by the Commission to try to define what constituted an objection was accepted by most delegations, who considered that any definition of an objection should necessarily take into account the author's intention and the legal effects the latter intended to produce.[18]

11. The proposed definition did, however, attract some criticism. According to some delegations, the intentional element limited to the legal effects intended by the author of the objection to the reservation was too restrictive: States made objections for a variety of reasons, often of a purely political nature, but also because they considered a reservation to be contrary to the object and purpose of a treaty.[19] According to those delegations, the definition proposed by the Special Rapporteur[20] would deny States the flexibility that they currently enjoyed.[21]

12. Some delegations maintained that the legal effects envisaged were too broad and diverged too far from the regime of the Vienna Convention.[22] In the view of these States, only the effects contemplated by the Vienna Convention should be

---

[15] Israel (A/C.6/58/SR.17, para. 47); Slovenia (A/C.6/58/SR.19, para. 4); the Netherlands (A/C.6/58/SR.19, para. 23); Argentina (A/C.6/58/SR.19, para. 89); Romania (A/C.6/58/SR.19, para. 62); Sweden (A/C.6/58/SR.19, para. 29); Italy (A/C.6/58/SR.19, para. 33); China (A/C.6/58/SR.19, para. 44); Chile (A/C.6/58/SR.19, para. 78); Kenya (A/C.6/58/SR.21, para. 36).

[16] France (A/C.6/58/SR.19, para. 37); Chile (A/C.6/58/SR.19, para. 79).

[17] Portugal (A/C.6/58/SR.19, para. 14); Pakistan (A/C.6/58/SR.20, para. 67); United States of America (A/C.6/58/SR.20, para. 9). The Special Rapporteur considers this idea rather surprising, since these articles do not in any way define an objection.

[18] See, particularly, Argentina (A/C.6/58/SR.19, para. 89); Romania (A/C.6/58/SR.19, para. 63); Japan (A/C.6/58/SR.19, para. 48); Australia (A/C.6/58/SR.20, para. 16); Malaysia (A/C.6/58/SR.20, para. 20).

[19] Netherlands (A/C.6/58/SR.19, para. 21; Sweden (A/C.6/58/SR.19, para. 28); United States of America (A/C.6/58/SR.20, para. 9); Israel (A/C.6/58/SR.17, para. 45).

[20] The definition of objection proposed by the Special Rapporteur reads as follows: "'Objection' means a unilateral statement, however phrased or named, made by a State or an international organization in response to a reservation to a treaty formulated by another State or international organization, whereby the State or organization purports to prevent the reservation having any or some of its effects." (*Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), para. 363).

[21] United States of America (A/C.6/58/SR.20, para. 9).

[22] See, however, Slovenia (A/C.6/58/SR.19, para. 4); Malaysia (A/C.6/58/SR.20, para. 20).

retained for the purposes of the definition, on the understanding, however, that room should be left for a "reservations dialogue" with the aim of persuading the reserving State to modify the reservation.[23] It was also maintained, however, that the definition of objections should include all negative reactions to the reservation,[24] and it was argued that it was advisable not to limit it to the legal effects established by the Vienna Conventions, since the legal effects of an objection depended above all on the intention of the objecting State.[25] Nonetheless, some States emphasized that objections with "super-maximum" effect destroyed a basic element of the consent of the State to become a party to the treaty.[26]

13. Lastly, some delegations proposed that the definition should evoke the strictly relative scope of the effects of an objection between the State author of the reservation in question and the State author of the objection.[27]

14. On a more general note, the delegations welcomed the guidelines adopted by the Commission;[28] some modifications were proposed,[29] and the Special Rapporteur will bear them in mind during the second reading of the Guide to Practice. It was also suggested that the commentary should indicate more systematically which of the guidelines were interpretative guidelines intended to clarify the provisions of the 1969 and 1986 Vienna Conventions and which of them were merely recommendations to States.[30] The Special Rapporteur is not convinced that this is any more feasible than to distinguish between rules that constitute codification *stricto sensu* and those that represent progressive development.[31]

15. It was also indicated that the modalities of the "reservations dialogue", which seemed to have aroused considerable interest among States, should not be predetermined, as there were many ways in which States could explain their intentions with respect to a reservation or objection.[32]

---

[23] France (A/C.6/58/SR.19, para. 38); Malaysia (A/C.6/58/SR.20, para. 20).

[24] Italy (A/C.6/58/SR.19, para. 31).

[25] The Netherlands (A/C.6/58/SR.19, para. 21); Cyprus (A/C.6/58/SR.19, para. 70); Greece (A/C.6/58/SR.20, para. 51); Bulgaria (A/C.6/58/SR.20, para. 63); Argentina (A/C.6/58/SR.19, para. 89); Romania (A/C.6/58/SR.19, para. 63); Japan (A/C.6/58/SR.19, para. 48); Australia (A/C.6/58/SR.20, para. 16); Malaysia (A/C.6/58/SR.20, para. 20).

[26] Islamic Republic of Iran (A/C.6/58/SR.20, para. 70).

[27] Viet Nam (A/C.6/58/SR.20, para. 23).

[28] Germany (A/C.6/58/SR.14); India (A/C.6/58/SR.21, para. 41); Hungary (A/C.6/58/SR.21, para. 7); Slovenia (A/C.6/58/SR.19, para. 3); Cyprus (A/C.6/58/SR.19, para. 70); Romania (A/C.6/58/SR.19, para. 62); Sweden (A/C.6/58/SR.19, para. 24); Bulgaria (A/C.6/58/SR.20, para. 63).

[29] Austria (A/C.6/58/SR.19, para. 92); Viet Nam (A/C.6/58/SR.20, para. 22).

[30] Poland (A/C.6/58/SR.19, para. 103); the Netherlands (A/C.6/58/SR.19, para. 20); Italy (A/C.6/58/SR.19, para. 30); Austria (A/C.6/58/SR.19, para. 92); Guatemala (A/C.6/58/SR.18, para. 9).

[31] Cf. Alain Pellet, "Conclusions générales in Société francaise pour le droit international, *La codification du droit international*, Colloque d'Aix-en-Provence, 1-3 October 1998 (Paris, Pedone, 1999), p. 330 or "Responding to new needs through codification and progressive development (keynote address)", *Multilateral Treaty-Making. The Current Status of, Challenges to and Reforms Needed in the International Legislative Process*, Vera Gowland-Debbas (ed.) (The Hague/Boston/London, Nijhoff, 2000), pp. 13-23, especially pp. 15-16, and George Abi-Saab, "Concluding Remarks", ibid., pp. 137-142, particularly p. 138.

[32] Japan (A/C.6/58/SR.19, para. 47).

B. Ninth report on reservations to treaties and the outcome

1. Consideration of the ninth report by the Commission

16. At its fifty-sixth session, the Commission provisionally adopted the draft guidelines referred to the Drafting Committee during its preceding session (see paras. 2-3 above) with the commentaries thereto.[33]

17. In his ninth report (A/CN.4/544), which was really in the nature of an adjustment to the second part of his eighth report (A/CN.4/535/Add.1), the Special Rapporteur had re-examined the issue of the definition of objections taking into account the criticisms levelled against his proposal during the Commission's preceding session (see para. 4 above) and within the Sixth Committee of the General Assembly (see paras. 8-13 above). The new definition, more neutral as regards the difficult (and premature) question of the validity of an objection and draft guideline 2.6.2 defining an objection to the late formulation or widening of the scope of a reservation were finally referred, with some changes, to the Drafting Committee; however, it was unable to consider them during the fifty-sixth session.

2. Consideration of chapter IX of the 2004 report of the Commission in the Sixth Committee

18. Chapter IX of the Commission's report on the work of its fifty-sixth session[34] deals with the topic of reservations to treaties. In accordance with established practice, a brief summary is given in chapter II[35] and the "specific issues on which comments would be of particular interest to the Commission" are set out in chapter III. With regard to reservations to treaties, the Commission asked States for their comments and observations on the terminology to be used in future to describe reservations that did not satisfy the requirements of article 19 of the Vienna Convention ("lawfulness", "permissibility", "admissibility" or "validity").[36]

19. A number of comments were made on the terminology question posed by the Commission, but no clear trend emerged. While the English terms "unlawful" and "wrongful" were categorically rejected, the French words "*licéité*", "*recevabilité*" and "*validité*" had both defenders and detractors. Some delegations maintained that the English terms "permissible/impermissible" (as a rendering of "*licite/illicite*" in French) seemed to enjoy broad acceptance and had the required neutrality.[37] However, the view was expressed that the term "permissibility" implied the existence of an organ empowered to rule on the compatibility of a reservation with the treaty.[38] It was also said that the term "validity" might prejudge the legal effects of a reservation.[39] Furthermore, the expression "invalid reservation" was viewed as

---

[33] *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 295.

[34] Ibid., paras. 248-295.

[35] Ibid., para. 17. See footnote 16 above.

[36] Ibid., paras. 33-37.

[37] Greece (A/C.6/59/SR.24, para. 10); Japan (A/C.6/59/SR.25, para. 6); Malaysia (A/C.6/59/SR.25, para. 40).

[38] Republic of Korea (A/C.6/59/SR.25, para. 31).

[39] Germany (A/C.6/59/SR.23, para. 68); Portugal (A/C.6/59/SR.24, para. 2).

potentially confusing because it implied that the reservation was formulated by an unauthorized representative of the State in question.[40]

20. Another view was that a distinction should be drawn between reservations that did not fulfil the conditions of paragraphs (a) and (b) of article 19 of the Vienna Convention and reservations that did not meet the condition set out in paragraph (c). While the former must be regarded as "impermissible", the latter should be characterized as "invalid".[41]

21. The term "admissibility" was favoured by various delegations as most accurately reflecting the situation between equal sovereign States.[42]

22. However, other delegations preferred the word "validity" because it appeared in a number of articles of the 1969 Vienna Convention other than article 19 and was therefore the most appropriate term.[43] Some delegations also stressed that the provisions of article 2, paragraph 1 (d), and article 23, paragraph 1, of the Convention on the timing and form of a reservation were also conditions of "validity".[44] Support was also expressed for the term "validity", on condition that a clear distinction was drawn between "opposability" and "validity". "Non-opposability" was considered the most appropriate penalty of "invalidity";[45] prima facie, the Special Rapporteur shares this view, but this issue will be considered in greater detail in a future report.

23. Some delegations took advantage of the terminology question posed by the Commission to restate their position on determining the validity of a reservation and its effects.[46]

24. With regard to the definition of objections to reservations, States also expressed a fairly wide range of views, which were very similar to those put forward the previous year (see paras. 8-13 above). While some delegations regarded the definition of objections as too narrow, particularly as regards the effects intended by the author of the objection,[47] other delegations expressed concern about the excessive flexibility of the definition in relation to the Vienna Convention.[48] It was also proposed, by way of a compromise between too broad and too narrow a definition, to define the objection as a reaction purporting to make the effects of the reservation non-opposable in relations between the State author of the objection and the State author of the reservation.[49] However, yet another group of delegations expressed satisfaction with the proposed definition, while observing that the central question, namely the effects of reservations in relation to objections, remained unresolved.[50] Nevertheless, a number of delegations maintained that the definition

[40] Singapore (A/C.6/59/SR.25, para. 21).
[41] Sweden (A/C.6/59/SR.24, para. 14); Singapore (A/C.6/59/SR.25, para. 20).
[42] Republic of Korea (A/C.6/59/SR.25, para. 31).
[43] United States of America (A/C.6/59/SR.24, para. 7); Spain (A/C.6/59/SR.24, para. 21).
[44] Belgium (A/C.6/59/SR.25, paras. 13-15).
[45] Poland (A/C.6/59/SR.24, para. 24); Japan (A/C.6/59/SR.25, para. 6); Belgium (A/C.6/59/SR.25, para. 12); Malaysia (A/C.6/59/SR.25, para. 40).
[46] See, for example, Belgium (A/C.6/59/SR.25, paras. 12-15); Singapore (A/C.6/59/SR.25, paras. 20-22).
[47] Italy (A/C.6/59/SR.24, para. 34); Russian Federation (A/C.6/59/SR.25, para. 23).
[48] France (A/C.6/59/SR.24, para. 16).
[49] France (A/C.6/59/SR.24, para. 18).
[50] Spain (A/C.6/59/SR.24, para. 20).

of objections should not leave room for an objection to have "super-maximum" effect, which clearly contravened the fundamental legal principles of treaties.[51] On the other hand, it was pointed out that the proposed definition might not adequately cover "minimum effect" objections, which, under certain conditions, actually produced the same effects as the reservation in question; an alternative definition was therefore proposed.[52]

25. Several delegations reverted to the issue of the widening of the scope of reservations, maintaining that the draft guidelines adopted by the Commission did not do enough to discourage the practice.[53] However, it was again pointed out (see para. 7 above) that widening or enlarging the scope of a reservation might be justified in certain circumstances, although only in exceptional cases.[54]

26. Other comments were made on matters relating essentially to form.[55] The Special Rapporteur will bear them in mind during the second reading of the Guide to Practice.

C. Tenth report on reservations to treaties and the outcome

1. Consideration of the tenth report by the Commission

27. At its fifty-seventh session, the Commission adopted the draft guidelines dealing with the definition of objections, which had been referred to the Drafting Committee at the preceding session, together with commentaries.[56]

28. In his tenth report, the Special Rapporteur introduced the issue of the validity of reservations while reserving for later the discussion of the outstanding questions concerning the formulation of reservations, acceptances and objections. Owing to time constraints, the Commission was not able to consider the tenth report in its entirety. Consideration of the draft guidelines dealing with the compatibility of a reservation with the object and purpose of the treaty (A/CN.4/558/Add.1 and Add.1/Corr.1), which had already given rise to a brief discussion,[57] as well as the question of the determination of the validity of reservations,[58] were reserved for the fifty-eighth session.

29. In general, the Commission looked favourably upon the other draft guidelines proposed by the Special Rapporteur in the first two sections of his tenth report. Only

---

[51] France (A/C.6/59/SR.24, paras. 16-17); Australia (A/C.6/59/SR.25, para. 44); Islamic Republic of Iran (A/C.6/59/SR.24, para. 36); Chile (A/C.6/59/SR.22, para. 89). See, however, the far-reaching view expressed by Sweden (on behalf of the Nordic countries) on objections with "super-maximum" effect (A/C.6/59/SR.24, para. 13).

[52] See Poland (A/C.6/59/SR.24, para. 23): "'Objection' means a unilateral statement, however phrased or named, made by a State or an international organization, whereby the State or organization purports to express an act of nonacceptance (or rejection) of the reservation, certain legal effects being attributable to this act".

[53] United Kingdom (A/C.6/59/SR.22, para. 36); Austria (A/C.6/59/SR.23, para. 79).

[54] Russian Federation (A/C.6/59/SR.25, para. 23).

[55] Malaysia (A/C.6/59/SR.25, para. 41); Australia (A/C.6/59/SR.25, para. 45); Russian Federation (A/C.6/59/SR.25, para. 23).

[56] *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), para. 438.

[57] A/CN.4/SR.2856, pp. 8-27, A/CN.4/SR.2857, pp. 15-18, and A/CN.4/SR.2858, pp. 1-30.

[58] A/CN.4/558/Add.2. See the Special Rapporteur's explanations, A/CN.4/SR.2854, p. 20.

a few drafting changes were suggested. Those draft guidelines were therefore referred to the Drafting Committee[59] together with draft guidelines 1.6 (Scope of definitions)[60] and 2.1.8 (Procedure in case of manifestly [impermissible] reservations),[61] which had already been provisionally adopted but had to be reviewed in light of the terminology change approved by the Commission, which, in accordance with the Special Rapporteur's proposal (A/CN.4/558, paras. 2-8 and A/CN.4/SR.2854, pp. 22-23), finally decided to use the more neutral term "validity" instead of "permissibility"(*licéité*), since the latter implicitly referred to the law of responsibility.[62]

30. However, the Drafting Committee was unable to consider the draft guidelines referred to it and deferred that task to the Commission's fifty-eighth session.

31. The Commission also welcomed the Special Rapporteur's proposal to organize, during its fifty-eighth or fifty-ninth session, a meeting with the human rights treaty bodies to discuss, inter alia, the issues of the validity of reservations, particularly in relation to the object and purpose of a treaty. However, that project has come up against a number of obstacles, which should perhaps be discussed by the Planning Group at the current session.

2. Consideration of chapter X of the 2005 report of the Commission in the Sixth Committee

32. Chapter X of the Commission's report on the work of its fifty-seventh session[63] deals with the topic of reservations to treaties. In accordance with established practice, a brief summary is given in chapter II[64] and the "specific issues on which comments would be of particular interest to the Commission" are set out in chapter III. With regard to reservations to treaties, the Commission put a single question to States.[65]

33. That question read as follows:

> "States often object to a reservation that they consider incompatible with the object and purpose of the treaty, but without opposing the entry into force of the treaty between themselves and the author of the reservation. The Commission would be particularly interested in Governments' comments on this practice. It would like to know, in particular, what effects the authors expect such objections to have, and how, in Governments' view, this practice accords with article 19 (c) of the 1969 Vienna Convention on the Law of Treaties".

---

[59] Draft guidelines 3.1 (Freedom to formulate reservations), 3.1.1 (Reservations expressly prohibited by the treaty), 3.1.2 (Definition of specified reservations), 3.1.3 (Reservations implicitly permitted by the treaty) and 3.1.4 (Non-specified reservations authorized by the treaty).

[60] For the text of this draft guideline and the commentary thereto, see *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), pp. 308-310.

[61] Ibid., *Fifty-seventh Session, Supplement No. 10* (A/57/10), pp. 112-114.

[62] A/CN.4/SR.2859, pp. 12-13; *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), para. 345.

[63] *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), paras. 333-438.

[64] Ibid., para. 18. See footnote 16 above.

[65] Ibid., para. 29.

34. A number of delegations submitted comments in response to the Commission's question, which, according to some, touched on a crucial and difficult aspect of the law governing reservations, even though, in practice, the issue of incompatibility with the object and purpose of a treaty arose in a relatively small number of rather extreme cases.[66] However, it must be admitted that the views expressed on that occasion were highly divergent.

35. Regardless of the concrete effects of an objection to a reservation regarded as incompatible with the object and purpose of the treaty pursuant to article 19, subparagraph (c), of the 1969 and 1986 Vienna Conventions, overall the comments reflected the notion that, in formulating such objections, States were expressing their disagreement with the reservation by judging it invalid. A number of delegations therefore took the view that such an objection, and especially an accumulation of similar objections, constituted an important element in determining the object and purpose of the treaty.[67]

36. Some delegations maintained that a simple objection to a reservation incompatible with the object and purpose of the treaty could result only in the application of the whole treaty without taking account of the reservation,[68] which amounts to what has been called the "super-maximum" effect of the objection. Other delegations, however, rejected the possibility of such an effect as contrary to the basic principle of consent underlying the law of treaties.[69] In the view of those States, applying the treaty without taking account of the reservation could be envisaged only in exceptional circumstances, where the reserving State could be considered as having accepted or acquiesced in such an effect.[70]

37. Most of the delegations that responded to the Commission's question explained a decision not to oppose the entry into force of a treaty by the desire to enter into treaty relations with the reserving State despite a reservation considered incompatible with the object and purpose of the treaty. That attitude was not justified solely by political or extralegal reasons.[71] Some delegations clearly maintained that, by employing such a "paradoxical" method of formulating a simple objection to a reservation incompatible with the object and purpose of the treaty, the objecting State could attempt to initiate a "reservations dialogue" in order to convince the reserving State to reconsider its reservation or withdraw it altogether.[72]

38. More generally, several delegations took the view that States found it difficult to consider the plethora of reservations formulated by other States. They also stressed that political considerations often led States to refrain from reacting to such

---

[66] United Kingdom (A/C.6/60/SR.14, para. 3).

[67] Japan (A/C.6/60/SR.14, para. 57); Belgium (A/C.6/60/SR.16, paras. 67 and 69); Greece (A/C.6/60/SR.19, para. 39).

[68] Sweden (on behalf of the Nordic countries) (A/C.6/60/SR.14, paras. 22-23); Spain (A/C.6/60/SR.17, para. 24); Malaysia (A/C.6/60/SR.18, para. 86); Greece (A/C.6/60/SR.19, para. 39).

[69] United Kingdom (A/C.6/60/SR.14, para. 3); Australia (A/C.6/60/SR.14, para. 40); France (A/C.6/60/SR.14, para. 72); Italy (A/C.6/60/SR.16, para. 20); Portugal (A/C.6/60/SR.16, para. 44); Spain (A/C.6/60/SR.17, para. 25).

[70] United Kingdom (A/C.6/60/SR.14, para. 4).

[71] Portugal (A/C.6/60/SR.16, para. 43).

[72] France (A/C.6/60/SR.14, para. 72); Italy (A/C.6/60/SR.16, para. 20); Portugal (A/C.6/60/SR.16, para. 44); Spain (A/C.6/60/SR.17, para. 25). In the same vein, see Japan (A/C.6/60/SR.14, para. 57); Belgium (A/C.6/60/SR.16, para. 69); Romania (A/C.6/60/SR.16, para. 77).

reservations. In light of the practical and political problems, those delegations took the view that the effect to be attached to silence on the part of States in such circumstances was far from clear; however, under no circumstances should that silence be interpreted as an "implicit validation" of the reservation.[73]

39. Referring more specifically to the Special Rapporteur's tenth report and the draft guidelines proposed or already adopted, the feedback from those delegations that made comments was generally positive.

40. It was maintained that the term "freedom" ("*faculté*") in the title of draft guideline 3.1 (Freedom to formulate reservations) did not fit the content of the Vienna regime and should be changed to "right" ("*droit*").[74] Some delegations had doubts about the presumption of validity of reservations implicit in the draft guideline (although it should be recalled that the draft guideline merely reproduces the provisions of article 19 of the Vienna Conventions). According to those States, there must be a balance between, on the one hand, the broadest possible participation in the treaty and, on the other, the integrity of that treaty.[75] It was also suggested that implicit prohibitions applicable to reservations should be incorporated into the draft guideline.[76]

41. The draft guidelines dealing with the object and purpose of the treaty and the definition of that concept, which the Commission had been unable to discuss in depth, were well received by those States that participated in the debate, some of which indicated that the Commission should continue to consider them.[77] Other delegations, however, wondered whether it was necessary or useful to seek to define the "object and purpose" of a treaty, taking the view that it would be more helpful to determine how that concept had been approached in individual cases.[78] It was also pointed out that the suggested definition was not really serviceable owing to the vague and elusive terms employed.[79]

42. With regard to draft guideline 3.1.7 (Vague, general reservations), it was maintained that automatically qualifying a general or vague reservation as incompatible with the object and purpose of the treaty was too severe, although the practice of formulating such reservations should certainly be discouraged.[80] There was also a suggestion to delete draft guideline 3.1.12 (Reservations to general human rights treaties), which risked introducing different standards for human rights treaties.[81] In addition, some delegations cautioned against combining the issues of reservations and dispute settlement. They took the view that draft guideline 3.1.13 (Reservations to treaty clauses concerning dispute settlement or the monitoring of the implementation of the treaty) might discourage States from participating in the

[73] United Kingdom (A/C.6/60/SR.14, paras. 1 and 5); Austria (A/C.6/60/SR.14, para. 13); Portugal (A/C.6/60/SR.16, para. 38). In this connection, see also A/CN.4/558/Add.2, paras. 204-205.

[74] United Kingdom (A/C.6/60/SR.14, para. 6).

[75] Malaysia (A/C.6/60/SR.18, para. 87).

[76] Spain (A/C.6/60/SR.17, para. 18); Bolivarian Republic of Venezuela (A/C.6/60/SR.20, para. 37).

[77] Russian Federation (A/C.6/60/SR.14, para. 18); Mexico (A/C.6/60/SR.15, para. 5); Argentina (A/C.6/60/SR.13, para. 103).

[78] United Kingdom (A/C.6/60/SR.14, para. 5); New Zealand (A/C.6/60/SR.14, para. 45); Guatemala (A/C.6/60/SR.14, para. 65).

[79] Sweden (A/C.6/60/SR.14, para. 21); China (A/C.6/60/SR.15, para. 19).

[80] Austria (A/C.6/60/SR.14, para. 15).

[81] Malaysia (A/C.6/60/SR.18, para. 89).

treaty in question;[82] furthermore, it was pointed out that reservations to such clauses had never been found to be contrary to the object and purpose of the treaty in the case law of the International Court of Justice.[83] Other delegations, however, took the view that the draft guideline struck a good balance between preservation of the object and purpose of the treaty and the freedom to choose mechanisms for settling disputes or monitoring the implementation of the treaty.[84]

43. These questions, however, were to be discussed in more detail by the Commission at its fifty-eighth session. The many comments relating specifically to the concrete effects of an objection,[85] which went above and beyond the issue of definition, will be taken into consideration by the Special Rapporteur in his next report, which will address the effects of accepting and objecting to reservations.

D. Recent developments with regard to reservations to treaties

44. In its judgment on jurisdiction and admissibility in the case of *Armed activities on the territory of the Congo (New Application: 2002)* (*Democratic Republic of the Congo v. Rwanda*) the International Court of Justice ruled on some noteworthy and important questions concerning the right to make reservations to treaties.

45. First, the Court addressed the purely procedural problem of the withdrawal of a reservation. The Democratic Republic of the Congo argued before the Court that Rwanda had withdrawn its reservation to article IX of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide by simply adopting a *décret-loi*, by means of which the Government of Rwanda withdrew reservations made by Rwanda upon accession to or approval and ratification of international human rights instruments. The Court did not, however, endorse that argument:

> "It is a rule of international law, deriving from the principle of legal security and well established in practice, that, subject to agreement to the contrary, the withdrawal by a contracting State of a reservation to a multilateral treaty takes effect in relation to the other contracting States only when they have received notification thereof. This rule is expressed in Article 22, paragraph 3 (*a*), of the Vienna Convention on the Law of Treaties, which provides as follows: '3. Unless the Treaty otherwise provides, or it is otherwise agreed: (*a*) the withdrawal of a reservation becomes operative in relation to another Contracting State only when notice of it has been received by that State.' Article 23, paragraph 4, of that same Convention further provides that '[t]he withdrawal of a reservation or of an objection to a reservation must be formulated in writing'.
>
> "[...] In the Court's view, the adoption of that *décret-loi* and its publication in the Official Journal of the Rwandese Republic cannot in themselves amount to such notification. In order to have effect in international law, the withdrawal

[82] Malaysia (A/C.6/60/SR.18, para. 90); Portugal (A/C.6/60/SR.16, para. 40).
[83] Malaysia (A/C.6/60/SR.18, para. 90); see also above, paras. 49-50.
[84] Spain (A/C.6/60/SR.17, para. 18).
[85] See, for example, the comments of the Netherlands (A/C.6/60/SR.14, para. 30), Guatemala (A/C.6/60/SR.14, para. 61) and Poland (A/C.6/60/SR.16, para. 31).

would have had to be the subject of a notice received at the international level".[86]

46. The Court thereby confirmed the rules contained in draft guidelines 2.5.2 (Form of withdrawal)[87] and 2.5.8 (Effective date of withdrawal of a reservation),[88] already adopted, which merely restate the rules resulting from the 1969 Vienna Convention.

47. Second, the Democratic Republic of the Congo contended before the Court that the Rwandan reservation to article IX of the Genocide Convention was invalid. Having reaffirmed the position it had taken in its Advisory Opinion of 28 May 1951 on the question concerning Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide,[89] according to which a reservation to that Convention would be permitted provided it was not incompatible with the object and purpose of the Convention, the Court concluded:

> "Rwanda's reservation to Article IX of the Genocide Convention bears on the jurisdiction of the Court, and does not affect substantive obligations relating to acts of genocide themselves under that Convention. In the circumstances of the present case, the Court cannot conclude that the reservation of Rwanda in question, which is meant to exclude a particular method of settling a dispute relating to the interpretation, application or fulfilment of the Convention, is to be regarded as being incompatible with the object and purpose of the Convention."[90]

The Court accordingly gave effect to Rwanda's reservation to article IX of the Genocide Convention, as it had already had occasion to do when considering comparable reservations in its orders on requests for the indication of provisional measures in the *Legality of Use of Force* cases.[91]

48. In substance, this solution is reflected in draft guideline 3.1.13 (Reservations to treaty clauses concerning dispute settlement or the monitoring of the implementation of the treaty), proposed by the Special Rapporteur in his tenth report on reservations to treaties (A/CN.4/558/Add.1, para. 99) which states:

> "A reservation to a treaty clause concerning dispute settlement or the monitoring of the implementation of the treaty is not, in itself, incompatible with the object and purpose of the treaty ...".

---

[86] International Court of Justice, *Judgment of 3 February 2006, Armed activities on the territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction of the Court and Admissibility of the Application*, paras. 41-42.

[87] "The withdrawal of a reservation must be formulated in writing". For the commentary to this draft guideline, see *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), para. 368, pp. 201-207.

[88] "Unless the treaty otherwise provides, or it is otherwise agreed, the withdrawal of a reservation becomes operative in relation to a contracting State or a contracting organization only when notice of it has been received by that State or that organization". For the commentary to this draft guideline, see ibid., pp. 231-242.

[89] *I.C.J. Reports 1951*, pp. 22 ff.

[90] See the judgment cited in footnote 86, para. 67.

[91] *Legality of Use of Force (Yugoslavia v. Spain), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999*, p. 772, paras. 32-33; *Legality of Use of Force (Yugoslavia v. United States of America), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999*, p. 924, paras. 24-25.

49. In their joint separate opinion, however, several judges stated the view that the principle applied by the Court in its judgment might not be absolute in scope. They stressed that there might be situations where reservations to clauses concerning dispute settlement could be contrary to the treaty's object and purpose: it depended on the particular case.[92] Such is the thrust of the last part of draft guideline 3.1.13 as proposed by the Special Rapporteur in his tenth report, which provides for two exceptions in which the principle would not apply.[93]

50. More generally, the authors of the joint separate opinion proposed a more nuanced reading of the 1951 Advisory Opinion. In particular, their opinion reflected the view that States did not have the sole competence to assess the compatibility of a reservation with the object and purpose of a treaty, and that the positions that several judicial and treaty monitoring bodies had taken were not contrary to the 1951 Advisory Opinion but simply constituted legal developments of questions not put before the Court in 1951.[94]

51. Third, however, with regard to the Rwandan reservation to article 22 of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination,[95] the Court took a substantially different approach, bearing in mind the mechanism for assessing the validity of reservations which the Convention itself provides for:

> "The Court notes that the Convention on Racial Discrimination prohibits reservations incompatible with its object and purpose. The Court observes in this connection that, under Article 20, paragraph 2, of the Convention, '[a] reservation shall be considered incompatible ... if at least two-thirds of the States Parties to [the] Convention object to it'. The Court notes, however, that such has not been the case as regards Rwanda's reservation in respect of the Court's jurisdiction. Without prejudice to the applicability *mutatis mutandis* to Rwanda's reservation to Article 22 of the Convention on Racial Discrimination of the Court's reasoning and conclusions in respect of Rwanda's reservation to

---

[92] Joint separate opinion of Judge Higgins, Judge Kooijmans, Judge Elaraby, Judge Owada and Judge Simma, para. 21.

[93] The text of the draft guideline 3.1.13 states:

"A reservation to a treaty clause concerning dispute settlement or the monitoring of the implementation of the treaty is not, in itself, incompatible with the object and purpose of the treaty, unless:

(i) The provision to which the reservation relates constitutes the raison d'être of the treaty; or

(ii) The reservation has the effect of excluding its author from a dispute settlement or treaty implementation monitoring mechanism with respect to a treaty provision that the author has previously accepted, if the very purpose of the treaty is to put such a mechanism into effect" (A/CN.4/558/Add.1, para. 99).

[94] Joint separate opinion cited in footnote 92 above, paras. 4-23. In their joint opinion, (para. 14), the five signatories had this to say about the Commission's work on reservations to treaties: "The study of reservations to treaties, in all its complexity, is under preparation in the International Law Commission. (On the issues under consideration in this opinion, see, in particular, Second Report on Reservations to Treaties, by Mr. Alain Pellet, Special Rapporteur, Report of the International Law Commission, to the General Assembly on the work of its Forty-ninth Session, *Yearbook of the International Law Commission*, Vol. II, Part Two (1997), pp. 44-57 (Chapter V: 'Reservations to Treaties'); Tenth Report on Reservations to Treaties, by Mr. Alain Pellet, Special Rapporteur, (...) docs. A/CN.4/558 (1 June 2005), A/CN.4/558/Add.1 (14 June 2005), A/CN.4/558/Add.2 (30 June 2005))".

[95] United Nations, *Treaty Series*, vol. 660, p. 195.

> Article IX of the Genocide Convention (see paragraphs 66-68 above [96]), the Court is of the view that Rwanda's reservation to Article 22 cannot therefore be regarded as incompatible with that Convention's object and purpose. The Court observes, moreover, that the DRC itself raised no objection to the reservation when it acceded to the Convention."[97]

52. In relation to the argument of the Democratic Republic of the Congo that the reservation in question was without legal effect because, on the one hand, the prohibition on racial discrimination was a peremptory norm of general international law and, on the other, such a reservation was in conflict with a peremptory norm, the Court referred:

> "to its reasoning when dismissing the DRC's similar argument in regard to Rwanda's reservation to Article IX of the Genocide Convention (see paragraphs 64-69 above[98]): the fact that a dispute concerns non-compliance with a peremptory norm of general international law cannot suffice to found the Court's jurisdiction to entertain such a dispute, and there exists no peremptory norm requiring States to consent to such jurisdiction in order to settle disputes relating to the Convention on Racial Discrimination."[99]

53. For their part, the bodies created within the United Nations or by international human rights conventions have continued to develop and harmonize their approaches to this issue. For example, in 2004, Ms. Françoise Hampson presented her final working paper on reservations to human rights treaties (E/CN.4/Sub.2/2004/42), a study of the formulation of reservations, State responses and the reactions of monitoring bodies and mechanisms. Highly interesting and well-balanced findings emerged from this far-reaching study. Notably, the author came to the following conclusions:

- Nothing suggests that "a special regime applies to human rights treaties or to a particular type of treaty which type includes human rights treaties" (para. 6);
- A judicial or quasi-judicial body "has an inherent jurisdiction to determine ...: (a) whether a statement is a reservation or not; and (b) if so, whether it is a valid reservation; and (c) to give effect to a conclusion with regard to validity"(para. 37);
- "General comments and concluding observations of a treaty body "are not binding on a State party. Neither are the conclusions of the Human Rights Committee acting under the Optional Protocol to the International Covenant on Civil and Political Rights. It is submitted, nevertheless, that the conclusion of the treaty body, whilst not binding, will have considerable persuasive force, not least because it is likely to reach similar conclusions with regard to similar reservations by other parties" (para. 18).

It is worth drawing attention in particular to paragraph 38 of the study:

> "It has been suggested that monitoring mechanisms do not have the authority to 'determine' anything, since their findings are not legally binding. It is submitted that this is to confuse two separate issues. The first question is

[96] See para. 47 above of the present report.
[97] See the judgment cited in footnote 86, para. 77.
[98] See para. 47 above of the present report.
[99] See the judgment cited in footnote 86, para. 78.

the scope of its authority to reach conclusions with regard to the substance. The second question is the binding character of the conclusions with regard to the substance. The fact that the conclusions of a monitoring body with regard to the substance are not legally binding does not mean that findings with regard to jurisdiction are not binding. It would, for example, be *ultra vires* the power of a monitoring body to exercise an authority which it does not have, even with the consent of the State in question".

These conclusions largely parallel those reached by the Special Rapporteur in his tenth report and are reflected, in particular, in draft guidelines 3.2 to 3.2.4 (A/CN.4/558/Add.2, paras. 151-180).

54. Pursuant to decision 2004/110 of the Subcommission on the Promotion and Protection of Human Rights (E/CN.4/2005/2, chap. II.B), this working paper was communicated to all treaty bodies and to the International Law Commission. Ms. Hampson recommended that any further consideration of the question should be suspended pending the upcoming work of the Commission on the topic (E/CN.4/Sub.2/2004/42, para. 72).

55. The third inter-committee meeting[100] and the sixteenth meeting of chairpersons of the human rights treaty bodies, held in Geneva on 21 and 22 June and from 23 to 25 June 2004, respectively, also considered the question of reservations to human rights treaties and found that "although not all treaty bodies were confronted with this issue, it would be useful to adopt a common approach".[101] A working group on reservations was established, as recommended at the fourth inter-committee meeting (A/60/278, annex, para. 14 and para. 35 (point VI)), to consider the report on the practice of human rights treaty bodies with respect to reservations to international human rights treaties (HRI/MC/2005/5 and Add.1), which is prepared and regularly updated by the Secretariat; the group is made up of one representative of each committee. At its meeting held on 8 and 9 June 2006,[102] the working group adopted the following recommendations for the attention of the fifth inter-committee meeting:[103]

"1. The working group welcomes the report on the practice of human rights treaty bodies with respect to reservations to international human rights treaties (HRI/MC/2005/5) and its updated version (HRI/MC/2005/5/Add.1) which the secretariat had compiled for the fourth inter-committee meeting.

2. The working group recommends that while any declaration made at the time of ratification may be considered as a reservation, however it was termed,

[100] These meetings were attended by members of the following human rights treaty bodies: Human Rights Committee, Committee on Economic, Social and Cultural Rights, Committee on the Rights of the Child, Committee on the Elimination of Discrimination against Women, Committee on the Elimination of Racial Discrimination, Committee against Torture and Committee on the Protection of Rights of All Migrant Workers and Members of Their Families.

[101] Report of the third inter-committee meeting of human rights treaty bodies (A/59/254), annex, para. 18. See also the Report of the fourth inter-committee meeting of human rights treaty bodies (A/60/278), annex, para. 14.

[102] At the meeting of 8 June, Mr. Georges Korontzis, Senior Assistant Secretary to the Commission, gave the working group information on the recent work of the Commission on the topic of reservations.

[103] When the present report was being finalized, the report of this meeting, held from 19 to 21 June 2006, was not yet available.

care must be exercised before concluding that the declaration should be considered as a reservation, even if the State had not used that term.

3. The working group recognizes that, despite the specific nature of the human rights treaties, which do not constitute a simple exchange of obligations between States but are the legal expression of the essential rights that each individual must be able to exercise as a human being, general treaty law is applicable to the human rights instruments and must be applied taking fully into account their specific nature, including their content and control mechanisms.

4. The working group considers that when reservations are authorized, whether explicitly or implicitly, they can contribute to the attainment of the objective of universal ratification. Unauthorized reservations, including those that are incompatible with the object and purpose of the treaty, do not contribute to attainment of the objective of universal ratification.

5. The working group considers that treaty bodies are competent to assess the validity of reservations, with a view to performing their functions, and possibly the implications of a finding of invalidity of a reservation, particularly in the examination of individual communications or in exercising other investigative functions in the case of treaty bodies that have such competence.

6. The working group considers that the identification of criteria for determining the validity of reservations in the light of the object and purpose of a treaty may be useful not only for States when they are considering making reservations, but also for treaty bodies in the performance of their functions. In this regard, the criteria contained in the draft methodological guidelines set out in the tenth report of the Special Rapporteur of the International Law Commission on reservations to treaties (A/CN.4/558/Add.1) constitute a step forward. The working group was pleased with its dialogue with the International Law Commission and welcomes the idea of further dialogue.

7. The working group considers that the only foreseeable consequences of invalidity are that the State could be considered as not being a party to the treaty, or as a party to the treaty but the provision to which the reservation has been made would not apply, or as a party to the treaty without the benefit of the reservation. The consequence that applies in a particular situation depends on the intention of the State at the time it enters its reservation. This intention must be identified during a serious examination of the available information, with the presumption, which may be refuted, that the State would prefer to remain a party to the treaty without the benefit of the reservation, rather than being excluded.

8. The working group welcomes the inclusion of a provision on reservations in the draft harmonized guidelines on reporting under the international human rights treaties, including the common core document and treaty-specific reports (HRI/MC/2006/3). It emphasizes the importance of dialogue between the treaty bodies and States making reservations; such dialogue would aim to distinguish more precisely the scope and consequences of reservations and possibly encourage the State party to reformulate or withdraw its reservations.

9. The working group recommends that another meeting be convened in the light of the latest discussions in the International Law Commission on reservations to treaties" (HRI/MC/2006/5, para. 16).

56. At the regional level, the European Observatory of Reservations to International Treaties, set up at the end of the 1990s by the Council of Europe's Committee of Legal Advisers on Public International Law (CAHDI),[104] has continued to promote and foster a common approach and response by States members of the Council to reservations formulated to conventions concluded both within and outside the framework of the Council of Europe. Pursuant to a decision taken in 2002 (see A/CN.4/535, para. 23), the Council of Europe committed itself to a genuine joint action based on a list of problematic reservations to treaties relating to the fight against terrorism drawn up by the Observatory. The Committee of Ministers, at the Deputy level, called on member States to consider withdrawing their possibly problematic reservations and invited the Secretary General of the Council to notify non-member States of the conclusions of CAHDI with regard to their reservations. The Committee of Ministers also encouraged member States "to volunteer to approach the non-member States concerned with regard to their respective reservations".[105] Interestingly, since these notifications were issued, a genuine dialogue has been taking place between the reserving States and the authorities of the Council of Europe. For example, the Russian Federation responded to the Secretary General's notification in 2005, explaining its reservation to the International Convention for the Suppression of the Financing of Terrorism; CAHDI consequently withdrew this reservation from its list of problematic reservations.[106] Showing that they too are responsive to the steps taken by the Council of Europe authorities, States not members of the Council have been providing explanations and clarifications of their reservations to instruments relating to the fight against terrorism that have been judged problematic.[107]

E. General presentation of the eleventh report

57. With the exception of a possible annex to reconsider the definition of the object and purpose of the treaty in the light of the discussion of the tenth report at the Commission's fifty-seventh session (see para. 28 above), the present report is entirely devoted to procedural questions, in order to complete the examination of the third part of the "Provisional plan of the study" presented by the Special Rapporteur in his second report[108] and adopted by the Commission in 1996.[109] It begins with an

[104] See the third report on reservations to treaties (A/CN.4/491), paras. 28-29, and the report of the Group of Specialists on Reservations to International Treaties (DI-S-RIT (98) 10).

[105] Decision of 7 December 2004 (CM (2004) 178), paras. 1-3; see also the decision of 2 November 2005 (CM (2005) 148), para. 1.

[106] CAHDI, 29th meeting, Strasbourg, 17-18 March 2005, Meeting report (CAHDI (2005) 8), paras. 84-85.

[107] Such is the case of Malaysia, which provided information and clarifications concerning its declaration to the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (CAHDI, 30th meeting, Strasbourg, 19-20 September 2005, Meeting report (CAHDI (2005) 19), paras. 42-43).

[108] A/CN.4/477, para. 37. See also the seventh report on reservations to treaties (A/CN.4/526), para. 18.

[109] See *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), paras. 116 ff.

examination of questions relating to the formulation of objections, which were already dealt with to some extent in the eighth and ninth reports on reservations to treaties (A/CN.4/535/Add.1 and A/CN.4/544). The formulation of acceptances[110] and reactions to interpretative declarations are then examined.

II. Formulation and withdrawal of acceptances and objections

A. Formulation and withdrawal of objections to reservations

58. At its fifty-seventh session, the Commission adopted draft guideline 2.6.1 on the definition of objections. It reads:

> **2.6.1 Definition of objections to reservations**
>
> "Objection" means a unilateral statement, however phrased or named, made by a State or an international organization in response to a reservation to a treaty formulated by another State or international organization, whereby the former State or organization purports to exclude or to modify the legal effects of the reservation, or to exclude the application of the treaty as a whole, in relations with the reserving State or organization.

59. This definition — which it might be preferable to include in the first section of the Guide to Practice on second reading — is deliberately incomplete[111] in that, unlike the definition of reservations,[112] it does not specify the instances when an objection may be formulated and does not specify which categories of States or international organizations can formulate an objection. These are important elements for assessing the extent of the freedom to make objections (sect. 1 below). This study will also have to be supplemented by specific provisions on the procedure to be followed for formulating objections (sect. 2 below) and of the conditions and effects of their withdrawal or modification (sect. 3 below).

1. Freedom to make objections

60. It is now well established that a State or an international organization may make an objection to a reservation formulated by another State or another international organization, irrespective of the question of the validity of the reservation.[113] Nevertheless, although that power is quite extensive (see paras. 63 and 66 below), it is not unlimited, and it therefore seems preferable to speak of a

---

[110] After giving the question much thought, the Special Rapporteur believes that the "reservations dialogue" cannot be discussed until the question of the effects of reservations and of acceptances of and objections to reservations has been considered.

[111] See the commentary to this draft guideline 2.6.1, *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), para. 438, sect. 26.1, paras. (4), (6) and (7) of the commentary.

[112] See draft guideline 1.1, ibid., *Fifty-eighth Session, Supplement No. 10* (A/58/10), para. 367.

[113] Throughout the present report, the Special Rapporteur sets aside the possible impact of the non-validity of the reservation on the effects of its acceptance or any objection to it. It is proposed that this matter will be studied when the effects of acceptances and objections come to be addressed.

"freedom" rather than a "right".[114] On the other hand, although reservations are only "formulated" by their authors, since they do not take effect until the other States or international organizations concerned have consented to them in one form or another,[115] the same is not true of objections, which are "made" solely by being unilaterally formulated by their authors, at least when they are parties to the treaty.[116]

61. The *travaux préparatoires* of the 1969 Vienna Convention leave no doubt as to the discretionary nature of the formulation of objections but are not very enlightening on the question of who may formulate them.

62. Adopted after heated debate in the Commission,[117] draft article 20, paragraph 2 (b), adopted on first reading by the Commission in 1962, established a link between objections and the incompatibility of reservations with the object and purpose of the treaty, which seemed to be the sine qua non for validity in both cases.[118] In response to the comments made by the Australian, Danish and United States Governments,[119] however, the Special Rapporteur reverted to the position taken by the Commission on first reading, omitting the reference to the criterion of compatibility from his proposed draft article 19, paragraph 3 (b).[120] The opposing opinion was nonetheless supported once more by Waldock in the Commission's debates,[121] but that did not prevent the Drafting Committee from once again leaving out any reference to the compatibility criterion — without, however, providing any

---

[114] Similarly with regard to reservations, see the presentation of the draft guideline 3.1 in the tenth report on reservations to treaties (A/CN.4/558, para. 12). In his first report on the law of treaties, however, Sir Humphrey Waldock mentioned "the right [of any State] to object" (*Yearbook* ..., 1962, vol. II, p. 62). After a lengthy discussion in the Commission on the question of the connection between objections and the compatibility of a reservation with the object and purpose of the treaty (*Yearbook ... 1962*, vol. I, 651st-656th meetings, pp. 139-179; see also para. 62 below), this requirement, which was included in draft article 19, paragraph 1 (a), as proposed by the Special Rapporteur, completely disappeared in the text of draft article 18 proposed by the Drafting Committee, which combined draft articles 18 and 19. In this respect, the Special Rapporteur noted that his two drafts "had been considerably reduced in length without, however, leaving out anything of substance" (ibid., vol. I, 663rd meeting, p. 223, para. 36). Neither during the debates nor in the later texts submitted to or adopted by the Commission, was the issue of the "right" to make objections revisited.

[115] See A/CN.4/558, para. 14.

[116] The situation may be different in two cases: the first being where the treaty itself has yet to enter into force, which goes without saying, and the second — considered below (para. 83) — where the objecting State or international organization intends to become a party but has not yet expressed its definitive consent to be bound.

[117] The criterion of compatibility with the object and purpose of the treaty played a large part in the early debates on reservations (*Yearbook ... 1962*, vol. I, 651st-656th meetings). One of the leading advocates of the link between this criterion and reactions to a reservation was Mr. Rosenne, who based his arguments on the Advisory Opinion of the International Court of Justice (see footnote 126 below) (*Yearbook ... 1962*, vol. I, 651st meeting, para. 79).

[118] According to that provision: "An objection to a reservation by a State which considers it to be incompatible with the object and purpose of the treaty precludes the entry into force of the treaty as between the objecting and the reserving State, unless a contrary intention shall have been expressed by the objecting State" (*Yearbook* ..., 1962, vol. II, p. 176).

[119] Fourth report on the law of treaties (A/CN.4/177 and Add.1), *Yearbook ... 1965*, vol. II, pp. 45-47.

[120] Ibid., p. 52, para. 10.

[121] *Yearbook ... 1965*, vol. I, 799th meeting, para. 65. See also Mr. Tsuruoka, ibid., para. 69. For an opposing view, see Mr. Tunkin, ibid., para. 37.

explanation.[122] In accordance with that position, paragraph 4 (b) of draft article 19, adopted on second reading in 1965, merely provided that "an objection by another contracting State to a reservation precludes the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is expressed by the objecting State".[123] Despite the doubts voiced by a number of delegations,[124] the Vienna Conference of 1968-1969 made no further reference to the lack of a connection between objections and the criteria of a reservation's validity. In response to a question by the Canadian representative, however, the Expert Consultant, Sir Humphrey Waldock, was particularly clear in his support for the position adopted by the Commission:

> "The second question was, where a reservation had not been expressly authorized, and at the same time was not one prohibited under article 16, paragraph (*c*), could a contracting State lodge an objection other than that of incompatibility with the object and purpose of the treaty? The answer was surely Yes. Each contracting State remained *completely free* to decide for itself, in accordance with its own interests, whether or not it would accept the reservation".[125]

63. On this point, the Vienna regime deviates from the solution adopted by the International Court of Justice in its 1951 Advisory Opinion,[126] which, in this regard, is certainly outdated and no longer corresponds to current positive law.[127] A State or an international organization has the right to formulate an objection both to a reservation that does not meet the criteria for validity and to a reservation that it

---

[122] Cf. *Yearbook ... 1965*, vol. I, 813th meeting, paras. 30-71 and, in particular, paras. 57-66.

[123] *Yearbook ...*, 1965, vol. II, p. 162.

[124] See, in particular, the United States amendment (A/CONF.39/C.1/L.127, *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna, 26 March-24 May 1968 and 9 April-22 May 1969, Documents of the Conference* (A/CONF.39/11/Add.2), p. 135) and the comments of the United States representative (*Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March-24 May 1968, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (A/CONF.39/11), Twenty-first meeting, para. 11). See also the critical comments made by Australia (ibid., Twenty-second meeting, para. 49), Japan (ibid., Twenty-first meeting, para. 29), Philippines (ibid., para. 58), United Kingdom (ibid., para. 74), Switzerland (ibid., para. 41) and Sweden (ibid., Twenty-second meeting, para. 32).

[125] *Summary records* (A/CONF.39/11), cited in footnote 124 above, Twenty-fifth meeting, para. 3 — italics added.

[126] The Court considered that "it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation. Such is the rule of conduct which must guide every State in the appraisal which it must make, individually and from its own standpoint, of the admissibility of any reservation". (Opinion cited in footnote 89 above, p. 24.) See Massimo Coccia, "Reservations to multilateral treaties on human rights", *California Western International Law Journal*, 1985, No. 1, pp. 8-9; Richard W. Edwards, Jr., "Reservations to treaties", *Michigan Journal of International Law*, 1989, No. 2, p. 397; Liesbeth Lijnzaad, *Reservations to UN-Human Rights Treaties. Ratify and Ruin?* (Dordrecht/Boston/London, Martinus Nijhoff Publishers, 1995), p. 51; Karl Zemanek, "Some unresolved questions concerning reservations in the Vienna Convention on the Law of Treaties", *Études en droit international en l'honneur du juge Manfred Lachs* (The Hague/Boston/Lancaster, Martinus Nijhoff Publishers, 1984), p. 333.

[127] It is also unlikely that it reflected the state of positive law in 1951. No one seems to have ever claimed that the freedom to formulate objections in the context of the system of unanimity was subject to the reservation being contrary to the object and purpose of the treaty.

deems to be unacceptable "in accordance with its own interests", even if it is valid. In other words, States and international organizations are free to object for any reason whatsoever and that reason may or may not have to do with the non-validity of the reservation.[128]

64. This solution is based on the principle of consent, which underlies the reservations regime and indeed all treaty law, as the Court recalled in its 1951 Advisory Opinion:

> "It is well established that in its treaty relations a State cannot be bound without its consent, and that consequently no reservation can be effective against any State without its agreement thereto."[129]

65. A State (or an international organization) is, therefore, never bound by treaty obligations[130] that are not in its interests. A State that formulates a reservation is simply proposing a modification of the treaty relations envisaged by the treaty (see A/CN.4/558, para. 14). No State, however, is obliged to accept those modifications — except for those resulting from reservations expressly authorized by the treaty, provided, of course, that they are not contrary to the object and purpose of the treaty.[131] Limiting the right to raise objections to reservations that are contrary to one of the criteria for validity established in article 19 would not only violate the sovereign right to accept or refuse treaty obligations,[132] but would also have the effect of establishing an actual right to make reservations. Such a right, which definitely does not exist, would contravene the very principle of the sovereign equality of States, since it would allow the reserving State (or international organization) to unilaterally impose its will on the other contracting

---

[128] Subject, of course, to the general principles of law which may limit the exercise of the discretionary power of States at the international level and the principle prohibiting abuse of rights.

[129] Opinion cited in footnote 89, above, p. 21. The dissenting judges also stressed this principle in their joint opinion: "The consent of the parties is the basis of treaty obligations. The law governing reservations is only a particular application of this fundamental principle, whether the consent of the parties to a reservation is given in advance of the proposal of the reservation or at the same time or later." (ibid., pp. 31 and 32). See also the famous dictum of the Permanent Court of International Justice in the case of the *S.S. "Lotus"*: "The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed." (Judgment of 7 September 1927, *P.C.I.J., Series A*, No. 10, p. 18). See also A/CN.4/477/Add.1, paras. 97 and 99.

[130] This clearly does not mean that States are not bound by legal obligations emanating from other sources.

[131] Frank Horn, *Reservations and Interpretative Declarations to Multilateral Treaties* (The Hague, T.M.C. Asser Institut, 1988), p. 121; Christian Tomuschat, "Admissibility and legal effects of reservations to multilateral treaties", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 27 (1967), p. 466.

[132] Christian Tomuschat, ibid.

parties.[133] In practice, this would render the mechanism of acceptances and objections null and void.[134]

66. It therefore seems to be indisputable that States and international organizations have the discretionary right to make objections to reservations. This should be reflected in a draft guideline that emphasizes that a State or international organization not only has the right to raise an objection to a reservation but may exercise that right in a discretionary manner; in other words, it may raise an objection for any reason, even merely for political reasons or reasons of expediency, without having to explain its reasons (on this point, see, however, paras. 105-111 below).

67. However, "discretionary" does not mean "arbitrary"[135] and, even though this right undoubtedly stems from the power of a State to exercise its own judgement, it is not absolute. Above all, it must be exercised within the limits arising from the procedural and form-related constraints that are developed in greater detail later in this report. Thus, for example, it should be emphasized at the outset that a State or international organization that has accepted a reservation loses its right to formulate an objection later to the same reservation. This can be derived implicitly from the presumption of acceptance of reservations established in article 20, paragraph 5, of the Vienna Conventions, which presumption will be discussed in more detail later, during the discussion of the acceptance procedure (see para. 57 above).

2.6.3 Freedom to make objections

A State or an international organization may formulate an objection to a reservation for any reason whatsoever, in accordance with the provisions of the present Guide to Practice

68. This freedom to make objections for any reason whatsoever also encompasses the freedom to oppose the entry into force of the treaty as between the reserving State or international organization, on the one hand, and the author of the objection, on the other. This is made possible by article 20, paragraph 4 (b), and article 21, paragraph 3, of the Vienna Conventions, which specify the effects of an objection.

69. Arriving at those provisions, in particular article 20, paragraph 4 (b), of the 1969 Convention, proved difficult. This was because the Commission's early special rapporteurs, staunch supporters of the system of unanimity, were barely interested in objections, the effects of which were, in their view, purely mechanical (see para. 88 below): it seemed self-evident to them that an objection prevents the reserving State from becoming a party to the treaty.[136] Even though he came to support a more flexible system, Sir Humphrey Waldock still adhered to that view in 1962, as is demonstrated by the draft article 19, paragraph 4 (c), presented in his first report on

---

[133] See, in this regard, the ninth of the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, adopted by the International Law Commission at its fifty-eighth session.

[134] See D. Müller, commentary to article 20, cited in footnote 1 above, para. 74. See also the statement made by Mr. Pal at the 653rd meeting of the International Law Commission (*Yearbook ... 1962*, vol. I, p. 153, para. 5).

[135] See, in particular, Stevan Jovanovic, *Restriction des compétences discrétionnaires des États en droit international* (Paris, Pedone, 1988).

[136] P. Reuter, *Introduction au droit des traités*, 2nd ed. (Paris, Presse Universitaire de France, 1985), p. 75, para. 132.

the law of treaties: "the objections shall preclude the entry into force of the treaty as between the objecting and the reserving States".[137]

70. The members of the Commission,[138] including the Special Rapporteur,[139] were, however, inclined to abandon that categorical approach in favour of a simple presumption in order to bring the wording of this provision more into line with the Court's Advisory Opinion of 1951, which stated:

> "As no State can be bound by a reservation to which it has not consented, it necessarily follows that each State objecting to it will or will not, on the basis of its individual appraisal within the limits of the criterion of the object and purpose stated above, consider the reserving State to be a party to the Convention."[140]

71. By strictly aligning themselves with this position, the members of the Commission introduced a simple presumption in favour of the non-entry into force of the treaty as between the reserving State and the objecting State and, at the same time, limited the possibility of opposing the treaty's entry into force in cases where the reservation was contrary to its object and purpose.[141] Draft article 20, paragraph 2 (b), adopted at its first reading, therefore provided the following:

> "An objection to a reservation by a State which considers it to be incompatible with the object and purpose of the treaty precludes the entry into force of the treaty as between the objecting and the reserving State, unless a contrary intention shall have been expressed by the objecting State."[142]

72. If the possibility of making an objection is no longer linked to the criterion of compatibility with the object and purpose of the treaty,[143] the freedom of the objecting State to oppose the treaty's entry into force in its relations with the reserving State becomes unconditional. The objecting State may, therefore, exclude all treaty relations between itself and the reserving State for any reason. The wording ultimately retained by the Commission went so far as to make this effect automatic: an objection (whatever the reason) precluded the entry into force of the treaty, unless the State concerned expressed its contrary intention.[144] During the

---

[137] *Yearbook ... 1962*, vol. II, p. 62.

[138] See, in particular, Mr. Tunkin (*Yearbook ... 1962*, vol. I, 653rd meeting, para. 26, and 654th meeting, para. 11), Mr. Rosenne (ibid., 653rd meeting. para. 30), Mr. Jiménez de Aréchaga (ibid., para. 48), Mr. de Luna (ibid., para. 66) and Mr. Yasseen (ibid., 654th meeting, para. 6).

[139] Ibid., 654th meeting, paras. 17 and 20.

[140] Opinion cited in footnote 89 above, p. 26.

[141] See para. 62 and footnote 117 above.

[142] *Yearbook ... 1962*, vol. II, p. 176 and p. 181, para. (23) of the commentary.

[143] On this point, see the explanations given in paragraph 62 above.

[144] Draft article 17, paragraph 4 (b), adopted on second reading, provided as follows: "An objection by another contracting State to a reservation precludes the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is expressed by the objecting State" (Report of the International Law Commission on the work of its eighteenth session, *Yearbook ... 1966*, vol. II, p. 202).

Conference at Vienna, the thrust of that presumption was reversed, not without heated debate, in favour of the entry into force of the treaty as between the objecting State and the reserving State.[145]

73. As open to criticism as this new approach may seem, the fact remains that the objecting State is still free to oppose the entry into force of the treaty in its relations with the reserving State. The reversal of the presumption simply requires the objecting State to make an express declaration to that effect, even though it remains completely free regarding its reasons for making such a declaration.

74. In practice, States have been curiously eager to state specifically that their objections do not prevent the treaty from entering into force vis-à-vis the reserving State, even though, by virtue of the presumption contained in article 20, paragraph 4 (b), of the Vienna Conventions, that would automatically be the case. Nor is this practice due to a desire to justify the objection, since States raise minimum-effect objections (specifically stating that the treaty will enter into force in their relations with the reserving State) even to reservations that they deem incompatible with the purpose and object of the treaty.[146] It is possible, however, to find examples of

---

[145] The question had already been raised during the discussion of the draft articles adopted on first reading by the members of the International Law Commission and by the Czechoslovak and Romanian delegations in the Sixth Committee (Sir Humphrey Waldock, fourth report (A/CN.4/177), footnote 119 above, pp. 48-49). The idea of reversing the presumption had been advocated by a number of Commission members (Mr. Tunkin (*Yearbook ... 1965*, vol. I, 799th meeting, para. 39) and Mr. Lachs (ibid., 813th meeting, para. 62)). Nonetheless, the proposals made in this regard by Czechoslovakia (A/CONF.39/C.1/L.85, in *United Nations Conference on the Law of Treaties, Documents of the Conference* (A/CONF.39/11/Add.2), footnote 124 above, p. 135), Syria (A/CONF.39/C.1/L.94, ibid.) and the Union of Soviet Socialist Republics (A/CONF.39/C.1/L.115, ibid., p. 133) were rejected by the Conference in 1968 (*Summary records* (A/CONF.39/11), footnote 124 above, Twenty-fifth meeting, para. 35 ff.). It was only in 1969 that a new Soviet amendment in this regard (A/CONF.39/L.3, in *United Nations Conference on the Law of Treaties, Documents of the Conference* (A/CONF.39/11/Add.2), footnote 124 above, pp. 265-266) was finally adopted by 49 votes to 21, with 30 abstentions (*United Nations Conference on the Law of Treaties, Official records, Second Session, Vienna, 9 April-22 May 1969, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (A/CONF.39/11/Add.1), tenth plenary meeting, para. 79).

[146] See Belgium's objections to the Egyptian and Cambodian reservations to the Vienna Convention on Diplomatic Relations (*Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2005* (ST/LEG/SER.E/24), (United Nations publication, Sales No. E.06.V.2), vol. I, chap. III.3) or the objections of Germany to several reservations concerning the same Convention (ibid., p. 94). It is, however, interesting to note that, even though Germany considers all the reservations in question as "incompatible with the letter and spirit of the Convention", the German Government stated for only some objections that they did not prevent the entry into force of the treaty as between Germany and the reserving States; it did not take a position on the other cases. Many examples can be found in the objections to the reservations formulated to the International Covenant on Civil and Political Rights, in particular the objections that were raised to the United States reservation to article 6 of the Covenant by Belgium, Denmark, Finland, France, Italy, the Netherlands, Norway, Portugal, Spain and Sweden (ibid., chap. IV.4). All these States considered the reservation to be incompatible with the object and purpose of the Covenant, but nonetheless did not oppose its entry into force in their relations with the United States. Only Germany remained silent regarding the entry into force of the Covenant, despite its objection to the reservation (ibid.). The phenomenon is not, however, limited to human rights treaties. See, for example, the objections made by Austria, France, Germany and Italy to Viet Nam's reservation to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (ibid., chap. VI.19) or the objections made by the States members of the Council of Europe to the reservations to the International Convention for the Suppression of Terrorist Bombings of 1997 (ibid., vol. II, chap. XVIII.9) or to the International Convention for the Suppression of the Financing of Terrorism of 1999 (ibid.).

objections where States specifically state that their objection does prevent the treaty from entering into force in their relations with the reserving State.[147] Such cases, though rare,[148] show that States can and do raise such objections when they see fit.

75. It follows that the power to make an objection for any reason whatsoever also means that the objecting State or international organization may freely oppose the entry into force of the treaty in their relations with the reserving State or organization. The author of the objection therefore remains completely free to modify the effects of the objection as it pleases and without having to justify its decision. It might be useful to state this clearly in a draft guideline 2.6.4, entitled as follows:

> **2.6.4 Freedom to oppose the entry into force of the treaty vis-à-vis the author of the reservation**
>
> A State or international organization that formulates an objection to a reservation may oppose the entry into force of the treaty as between itself and the reserving State or international organization for any reason whatsoever, in accordance with the provisions of the present Guide to Practice.

76. Draft guideline 2.6.1 on the definition of objections to reservations does not, in fact, resolve the question of which States or international organizations have the freedom to make objections to a reservation formulated by another State or another international organization, a question which the Commission explicitly set aside when it adopted the draft guideline (see para. 59 above).

77. The Vienna Conventions provide some guidance on this matter. Article 20, paragraph 4 (b), of the 1986 Convention refers to "an objection by a contracting State or by a contracting organization ...". However, it should not necessarily be inferred from this phrase that only contracting States or organizations within the

---

[147] See, for example, the objections of China and the Netherlands to the reservations made by a number of socialist States to the Convention on the Prevention and Punishment of the Crime of Genocide (*Multilateral Treaties* ..., footnote 146 above, vol. I, chap. IV.1), the objections of Israel, Italy and the United Kingdom to the reservations formulated by Burundi to the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents of 1973 (ibid., vol. II, chap. XVIII.7), the objections of France and Italy to the United States reservation to the Agreement on the International Carriage of Perishable Foodstuffs and on the Special Equipment to be used for such Carriage (ibid., vol. I, chap. XI.B.22) or the objections of the United Kingdom to the Syrian and Vietnamese reservations and the objections of New Zealand to the Syrian reservation formulated to the Vienna Convention on the Law of Treaties (ibid, vol. II, chap. XXIII.1).

[148] This is not to imply that maximum-effect objections accompanied by the declaration provided for in article 20, paragraph 4 (b), are a type of objection that is disappearing, as suggested by Rosa Riquelme Cortado (*Las Reservas a los Tratados: Lagunas y Ambigüedades del Régimen de Viena* (Universidad de Murcia, 2004), p. 283). It has been argued that the thrust of the presumption retained at the Vienna Conference (in favour of the entry into force of the treaty) and political considerations may explain the reluctance of States to resort to maximum-effect objections (see Catherine Redgwell, "Universality or integrity? Some reflections on reservations to general multilateral treaties", *British Yearbook of International Law*, 1993, p. 267). See, however, the explanations provided by States to the question raised by the Commission on this subject, paras. 33 to 38 above, in particular paragraph 37.

meaning of article 2, paragraph 1 (f), are authorized to formulate objections.[149] Article 20, paragraph 4 (b), simply determines the possible effects of an objection raised by a contracting State or by a contracting organization; however, the fact that paragraph 4 does not specify the effects of objections formulated by States other than contracting States or by organizations other than contracting organizations does not necessarily mean that such other States or organizations may not formulate objections.[150] In reality, it may be wise for States or international organizations that intend to become parties but have not yet expressed their definitive consent to be bound to express their opposition to a reservation. These "pre-emptive" objections will have the effects envisaged in articles 20 and 21 only when their author becomes a contracting State or a contracting organization.[151]

78. The limitation on the possible authors of an objection that article 20, paragraph 4 (b), of the Vienna Conventions might seem to imply is not found in article 21, paragraph 3, on the effects of the objection on the application of the treaty in cases where the author of the objection has not opposed the entry into force of the treaty between itself and the reserving State. Above all, as article 23, paragraph 1, clearly states, reservations, express acceptances and objections must be communicated not only to the contracting States but also to "other States entitled to become parties to the treaty". Such a notification has meaning only if these other States can, in fact, react to the reservation by way of an express acceptance or an objection. The specific effects of these reactions is a separate issue.

79. The draft article 19 proposed by Waldock in his first report on the law of treaties, an article devoted entirely to objections and their effects, provided, moreover, that "any State which is *or is entitled to become a party* to a treaty shall have the right to object ...".[152]

80. The practice of the Secretary-General as depositary of multilateral treaties with regard to objections formulated by non-contracting or non-signatory States is ambiguous in this regard. Such objections are termed "communications" and, since they are deemed to have no legal effect, they are not registered under Article 102 of the Charter of the United Nations, nor are they published in the *Treaty Series*.[153] The reason for this is that, except in a few specific cases,[154] an objection formulated by a signatory State has no effect as long as the State that formulated the objection does not become a party to the treaty in question. The practice of the Secretary-General does not therefore shed much light on the freedom to formulate objections,

---

[149] This position seems to be defended by Belinda Clark, "The Vienna Convention reservations regime and the Convention on Discrimination Against Women", *American Journal of International Law*, vol. 85 (1991), No. 2, p. 297.

[150] In this regard, see Pierre-Henri Imbert, *Les réserves aux traités multilatéraux* (Paris, Pedone, 1979), p. 150.

[151] In its 1951 Advisory Opinion, the International Court of Justice considered that "an objection to a reservation made by a State which is entitled to sign or accede but which has not yet done so, is without legal effect" (Opinion cited in footnote 89 above, p. 30). However, this in no way implies that these States may not formulate objections.

[152] *Yearbook ... 1962*, vol. II, p. 62 (italics added).

[153] *Summary of practice of the Secretary-General as depositary of multilateral treaties* (ST/LEG/8) (United Nations publication, Sales No. E.94.V.15), para. 214.

[154] Cf. article 20, para. 2, of the Vienna Conventions: an objection prevents the requirement of unanimous acceptance provided for in this article from being met.

because simply saying that an objection has no effect does not mean that it cannot be formulated.

81. The freedom to make objections is not, therefore, limited to contracting States or international organizations. However, this does not mean that just any State or international organization can raise an objection. There is clearly no reason why a State or an international organization that has no intention of becoming a party to a treaty should be able to express an opinion about reservations to it; such an objection would, in this specific case, have no effect, not even a potential effect.

82. These considerations, taken together, suggest that only States and organizations that are contracting parties or are "entitled to become parties to the treaty" may object to reservations that have been formulated. Such a limitation, though it may seem superfluous for "open" treaties containing the words "any State", is needed to cover the specific situation of treaties with limited participation, regardless of whether or not they are subject to the unanimity requirement imposed by article 20, paragraph 2, of the Vienna Conventions.

83. However, it should be noted that, while objections formulated by parties to the treaty are "made" from the very moment that they are formulated, in the sense that they produce their effects immediately (see para. 60 above), it could be asked whether those emanating from States or international organizations that are not parties to the treaty could be deemed to be "made" when the objections will not have concrete effects until the treaty enters into force with regard to them. In the view of the Special Rapporteur, this nuance should be reflected by using the word "formulated" rather than "made" in draft guideline 2.6.5, which might be adopted in order to clarify draft guidelines 2.6.1 and 2.6.2 on these points. The effect of this change should not, however, be exaggerated: in this case, contrary to what happens in the case of reservations, the effects of the objection are not subject to a specific reaction by the reserving State or by another party to the treaty.

84. Consequently, draft guideline 2.6.5 might be worded as follows:

2.6.5 Author of an objection

An objection to a reservation may be formulated by:

(i) Any contracting State and any contracting international organization; and

(ii) Any State and any international organization that is entitled to become a party to the treaty.

85. Even though, according to the definition contained in draft guideline 2.6.1, an objection is a unilateral statement,[155] it is perfectly possible for a number of States and/or a number of international organizations to formulate an objection jointly.

[155] See also the commentary to draft guideline 2.6.1 (Definition of objections to reservations), *General Assembly, Official Records, Sixtieth Session, Supplement No. 10* (A/60/10), para. 438, p. 188, para. (6) of the commentary.

Practice in this area is not highly developed; it is not, however, non-existent.[156] A particularly striking example is to be found in the objections formulated in identical terms by Belgium, Denmark, France, Germany, Ireland, Italy, Luxembourg, the Netherlands, the United Kingdom and the European Community with respect to the similar declarations made by Bulgaria and the German Democratic Republic to the Customs Convention on the International Transport of Goods under Cover of TIR Carnets.[157] The European Community has also formulated a number of objections "on behalf of the European Economic Community and of its member States".[158]

86. Technically, moreover, there is nothing to prevent the joint formulation of an objection, just as there is nothing to prevent the joint formulation of reservations (see A/CN.4/491/Add.3, paras. 130-133). However, this in no way affects the unilateral nature of the objection. For these reasons, the Commission will undoubtedly wish to adopt a draft guideline modelled on the equivalent draft guideline relating to the joint formulation of reservations.[159]

2.6.6 Joint formulation of an objection

The joint formulation of an objection by a number of States or international organizations does not affect the unilateral nature of that objection.

2. Procedure for the formulation of objections

87. The procedural rules concerning the formulation of objections are not notably different from those that apply to the formulation of reservations. This is, perhaps, the reason why the International Law Commission apparently did not pay very much attention to these issues during the preparatory work for the 1969 Vienna Convention.

88. That lack of interest can easily be explained in the case of the special rapporteurs who advocated the traditional system of unanimity, namely Brierly,

---

[156] In the context of regional organizations, in particular the Council of Europe, States strive to coordinate and harmonize their reactions and objections to reservations. Even though member States continue to formulate objections individually, they coordinate not only on the timing, but also on the wording, of objections, especially in the case of objections to reservations relating to counter-terrorism conventions (see also para. 56 above); see, for example, the objections of certain States members of the Council of Europe to the International Convention for the Suppression of Terrorist Bombings of 1997 (*Multilateral treaties* ..., footnote 146 above, vol. II, chap. XVIII.9) or to the International Convention for the Suppression of the Financing of Terrorism of 1999 (ibid., pp. 170-183).

[157] Ibid., vol. I, chap. XI.A.16.

[158] See, for example, the objection to the declaration made by the Union of Soviet Socialist Republics with respect to the Tropical Timber Agreement of 1983 (*Multilateral treaties ...: Status as at 31 December 1987* (ST/LEG/SER.E/6), United Nations publication, Sales No. E.88.V.3, chap. XIX.26) and the identical objection to the declaration made by the Union of Soviet Socialist Republics with respect to the Wheat Trade Convention of 1986 (ibid., chap. XIX.28). In the same vein, see the practice followed at the Council of Europe since 2002 with respect to reservations to conventions relating to the fight against terrorism (para. 56 above).

[159] Draft guideline 1.1.7 (Reservations formulated jointly): "The joint formulation of a reservation by a number of States or international organizations does not affect the unilateral nature of that reservation." For the commentary to this draft guideline, see *Yearbook ... 1998*, vol. II, Part Two, pp. 106-107. See also draft guideline 1.2.2 (Interpretative declarations formulated jointly) and the commentary thereto (*Yearbook ... 1999*, vol. II, Part Two, pp. 106-107).

Lauterpacht and Fitzmaurice.[160] While it was only logical, in their view, that an acceptance, which is at the heart of the traditional system of unanimity, should be provided with a legal framework, particularly where its temporal aspect was concerned, an objection, which they saw simply as a refusal of acceptance that prevented unanimity from taking place and, consequently, the reserving State from becoming a party to the instrument, did not seem to warrant specific consideration.

89. It was only logical that Sir Humphrey Waldock's first report, which introduced the "flexible" system in which objections play if not a more important then at least a more ambiguous role, contained an entire draft article on procedural issues relating to the formulation of objections.[161] Despite the very detailed nature of this provision, the report limits itself to a very brief commentary by indicating that "the provisions of this article are for the most part a reflex of provisions contained in [the articles on the power to formulate and withdraw reservations (article 17) and on consent to reservations and its effects (article 18)] and do not therefore need further explanation".[162]

---

[160] Even though Lauterpacht's proposals *de lege ferenda* envisaged objections, the Special Rapporteur did not consider it necessary to set out the procedure that should be followed when formulating them. See the alternative drafts of article 9, H. Lauterpacht, [First] Report on the law of treaties, A/CN.4/63, *Yearbook ... 1953*, vol. II, pp. 91-92.

[161] This draft article 19 read as follows:

"...

2. (a) An objection to a reservation shall be formulated in writing by the competent authority of the objecting State or by a representative of the State duly authorized for that purpose.

(b) The objection shall be communicated to the reserving State and to all other States which are or are entitled to become parties to the treaty, in accordance with the procedure, if any, prescribed in the treaty for such communications.

(c) If no procedure has been prescribed in the treaty but the treaty designates a depositary of the instruments relating to the treaty, then the lodging of the objection shall be communicated to the depositary whose duty it shall be:

(i) To transmit the text of the objection to the reserving State and to all other States which are or are entitled to become parties to the treaty; and

(ii) To draw the attention of the reserving State and the other States concerned to any provisions in the treaty relating to objections to reservations.

3. (a) In the case of a plurilateral or multilateral treaty, an objection to a reservation shall not be effective unless it has been lodged before the expiry of twelve calendar months from the date when the reservation was formally communicated to the objecting State; provided that, in the case of a multilateral treaty, an objection by a State which at the time of such communication was not a party to the treaty shall nevertheless be effective if subsequently lodged when the State executes the act or acts necessary to enable it to become a party to the treaty.

(b) In the case of a plurilateral treaty, an objection by a State which has not yet become a party to the treaty, either actual or presumptive, shall:

(i) Cease to have effect, if the objecting State shall not itself have executed a definitive act of participation in the treaty within a period of twelve months from the date when the objection was lodged;

(ii) Be of no effect, if the treaty is in force and four years have already elapsed since the adoption of its text.

..."

(First report on the law of treaties (A/CN.4/144), *Yearbook ... 1962*, vol. II, p. 62).

[162] Ibid., p. 68, para. (22) of the commentary.

90. After major re-working of the draft articles on acceptance and objection initially proposed by the Special Rapporteur,[163] only draft article 18, paragraph 5, presented by the Drafting Committee in 1962 deals with the formulation and the notification of an objection,[164] a provision which, in the view of the Commission, "do[es] not appear to require comment".[165] That lack of interest continued into 1965, when the draft received its second reading. And even though objections found a place in the new draft article 20 devoted entirely to questions of procedure, the Special Rapporteur still did not consider it appropriate to comment further on those provisions.[166]

91. The desirability of parallel procedural rules for the formulation, notification and communication of reservations, on the one hand, and of objections, on the other, was stressed throughout the debate in the Commission and was finally reflected in article 23, paragraph 1, of the 1969 Vienna Convention on the Law of Treaties, which sets forth the procedure for formulating an express acceptance of or an objection to a reservation. In 1965, Mr. Castrén rightly observed:

> "Paragraph 5 [of draft article 20, which, considerably shortened and simplified, was the source for article 23, paragraph 1] laid down word for word precisely the same procedural rules for objections to a reservation as those applicable under paragraph 1 to the proposal and notification of reservations. Preferably, therefore, the two paragraphs should be amalgamated or else paragraph 5 should say simply that the provisions of paragraph 1 applied also to objections to a reservation."[167]

92. Therefore, it may be wise to simply take note, within the framework of the Guide to Practice, of this procedural parallelism between the formulation of reservations and the formulation of objections. It is particularly important to note that the requirement of a marked formalism that is a consequence of these similarities between the procedure for the formulation of objections and the procedure for the formulation of reservations is justified by the highly significant effects that an objection may have on the reservation and its application as well as on the entry into force and the application of the treaty itself.[168]

93. The parallel cannot be complete, however. It is clear that some rules of procedure applicable to the formulation of reservations cannot be transposed to the formulation of objections. This is clearly the case with respect to the time at which an objection may be formulated; the question of the confirmation of an objection formulated before the author is a party must obviously be posed in different

---

[163] The only explanation that can be found in the work of the Commission for merging the draft articles initially proposed by Sir Humphrey is found in his presentation of the report of the Drafting Committee at the 663rd meeting of the Commission (see footnote 114 above). On that occasion, the Special Rapporteur stated that "the new article 18 covered both acceptance of and objection to reservations; the contents of the two former articles 18 and 19 had been considerably reduced in length without, however, leaving out anything of substance" (*Yearbook ... 1962*, vol. I, 663rd meeting, para. 36).

[164] *Yearbook ... 1962*, vol. I, 668th meeting, para. 30. See also draft article 19, paragraph 5, adopted on first reading, *Yearbook ... 1962*, vol. II, p. 176.

[165] *Yearbook ... 1962*, vol. II, p. 180, para. (18) of the commentary.

[166] Fourth report on the law of treaties (A/CN.4/177), *Yearbook ... 1965*, vol. II, pp. 53-54, para. 19.

[167] *Yearbook ... 1965*, vol. I, 799th meeting, para. 53.

[168] See article 20, para. 4 (b), and article 23, para. 3, of the Vienna Conventions.

terms.[169] Moreover, while the requirement of written form applies to the formulation of an objection as well as that of a reservation, it is no doubt helpful to say so specifically. These three questions at least merit separate draft guidelines.

94. In contrast, the rules regarding the authorities competent to formulate reservations at the international level and the consequences (or the absence of consequences) of the violation of internal rules regarding the formulation of reservations, the rules regarding the notification and communication of reservations and the rules regarding the functions of the depositary in this area would seem to be transposable mutatis mutandis to the formulation of objections. Rather than reproducing draft guidelines 2.1.3 (Formulation of a reservation at the international level),[170] 2.1.4 (Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations),[171] 2.1.5 (Communication of reservations),[172] 2.1.6 (Procedure for communication of

---

[169] See article 23, para. 3, of the Vienna Conventions.

[170] **2.1.3 Formulation of a reservation at the international level**

1. Subject to the customary practices in international organizations which are depositaries of treaties, a person is considered as representing a State or an international organization for the purpose of formulating a reservation if:

(a) That person produces appropriate full powers for the purposes of adopting or authenticating the text of the treaty with regard to which the reservation is formulated or expressing the consent of the State or organization to be bound by the treaty; or

(b) It appears from practice or other circumstances that it was the intention of the States and international organizations concerned to consider that person as competent for such purposes without having to produce full powers.

2. By virtue of their functions and without having to produce full powers, the following are considered as representing a State for the purpose of formulating a reservation at the international level:

(a) Heads of State, heads of Government and Ministers for Foreign Affairs;

(b) Representatives accredited by States to an international conference for the purpose of formulating a reservation to a treaty adopted at that conference;

(c) Representatives accredited by States to an international organization or one of its organs, for the purpose of formulating a reservation to a treaty adopted by that organization or body; or

(d) Heads of permanent missions to an international organization, for the purpose of formulating a reservation to a treaty between the accrediting States and that organization (*Official Records of the General Assembly, Fifty-seventh Session, Supplement No 10* (A/57/10), para. 102 and commentary, para. 103).

[171] **2.1.4 Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations**

The determination of the competent authority and the procedure to be followed at the internal level for formulating a reservation is a matter for the internal law of each State or the relevant rules of each international organization.

A State or an international organization may not invoke the fact that a reservation has been formulated in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for formulating reservations as invalidating the reservation (ibid.).

[172] **2.1.5 Communication of reservations**

A reservation must be communicated in writing to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty.

A reservation to a treaty in force which is the constituent instrument of an international organization or which creates an organ that has the capacity to accept a reservation must also be communicated to such organization or organ (ibid.).

reservations)[173] and 2.1.7 (Functions of depositaries),[174] simply replacing "reservation" with "objection" in the text of the drafts, it is the opinion of the Special Rapporteur that referring to these draft guidelines is sufficient.[175]

2.6.9 Procedure for the formulation of objections

Draft guidelines 2.1.3, 2.1.4, 2.1.5, 2.1.6 and 2.1.7 are applicable mutatis mutandis to objections.

(a) Form of an objection

(i) Written form

95. Pursuant to article 23, paragraph 1, of the 1969 and 1986 Vienna Conventions, an objection to a reservation "must be formulated in writing and communicated to the contracting States and other States entitled to become parties to the treaty".

96. As is the case for reservations,[176] the requirement that an objection to a reservation must be formulated in writing was never called into question but was presented as self-evident in the debates in the Commission and at the Vienna Conferences. In his first report, Sir Humphrey Waldock, the first special rapporteur

---

[173] **2.1.6 Procedure for communication of reservations**

Unless otherwise provided in the treaty or agreed by the contracting States and contracting organizations, a communication relating to a reservation to a treaty shall be transmitted:

(i) If there is no depositary, directly by the author of the reservation to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty; or

(ii) If there is a depositary, to the latter, which shall notify the States and organizations for which it is intended as soon as possible.

A communication related to a reservation shall be considered as having been made by the author of the reservation only upon receipt by the State or by the organization to which it was transmitted, or as the case may be, upon its receipt by the depositary.

The period during which an objection to a reservation may be raised starts at the date on which a State or an international organization received notification of the reservation.

Where a communication relating to a reservation to a treaty is made by electronic mail or by facsimile, it must be confirmed by diplomatic note or depositary notification. In this case, the communication is considered as having been made on the date of the electronic mail or facsimile (ibid.).

Paragraph 3 of this guideline raises problems in that it makes a rule regarding the period during which an objection to a reservation may be raised; this problem is discussed at length in paragraphs 126-129 below.

[174] **2.1.7 Functions of depositaries**

The depositary shall examine whether a reservation to a treaty formulated by a State or an international organization is in due and proper form and, where appropriate, bring the matter to the attention of the State or international organization concerned.

In the event of any difference appearing between a State or an international organization and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of:

(a) The signatory States and organizations and the contracting States and contracting organizations; or

(b) Where appropriate, the competent organ of the international organization concerned (ibid.).

[175] The Commission proceeded in the same manner in draft guidelines 1.5.2 (referred to draft guidelines 1.2 and 1.2.1), 2.4.3 (referred to draft guidelines 1.2.1, 2.4.6 and 2.4.7) and, even more obviously, in 2.5.6 (referred to draft guidelines 2.1.5, 2.1.6 and 2.1.7).

[176] See draft guideline 2.1.1 (Written form) and commentary, *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10), para 103.

to draft provisions on objections (see also paras. 87-89 above), already provided in paragraph 2 (*a*) of draft article 19, which dealt entirely with objections to reservations, that "an objection to a reservation shall be formulated in writing ...",[177] without making this formal requirement the subject of commentary.[178] While the procedural guidelines were comprehensively revised by the Special Rapporteur in light of the comments of two Governments suggesting that "some simplification of the procedural provisions"[179] was desirable, the requirement of a written formulation for an objection to a reservation was always explicitly stipulated:

- In article 19, paragraph 5, adopted on first reading (1962): "An objection to a reservation shall be formulated in writing ..." and "shall be communicated";[180]
- In article 20, paragraph 5, proposed by the Special Rapporteur in his fourth report (1965): "An objection to a reservation must be in writing";[181]
- In article 20, paragraph 1, adopted on second reading (1965): "A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the other States entitled to become parties to the treaty".[182]

The written form was not called into question at the Vienna Conference in 1968 and 1969 either. On the contrary, all proposed amendments to the procedure in question retained the requirement that an objection to a reservation must be formulated in writing.[183]

97. That objections must be in written form is well established. Notification, another procedural requirement applicable to objections (by virtue of article 23, paragraph 1, of the Vienna Conventions), requires a written document; oral communication alone cannot be filed or registered with the depositary of the treaty or communicated to other interested States. Furthermore, considerations of legal security justify and call for the written form. One must not forget that an objection has significant legal effects on the opposability of a reservation, the applicability of the provisions of a treaty as between the reserving State and the objecting State (article 21, paragraph 3, of the Vienna Conventions) and the entry into force of the treaty (article 20, paragraph 4). In addition, an objection reverses the presumption of acceptance arising from article 20, paragraph 5, of the Vienna Conventions, and written form is an important means of proving whether a State did indeed express an

---

[177] First report (A/CN.4/144), cited in footnote 161 above, p. 62.

[178] Ibid., p. 68, para. (22) of commentary on article 19, which refers the reader to the commentary on article 17 (ibid., page 66, para. (11)).

[179] The Governments of Sweden and Denmark. See Sir Humphrey Waldock, Fourth report (A/CN.4/177), cited in footnote 166 above, pp. 46 and 47 and p. 53, para. 13.

[180] *Yearbook ... 1962*, vol. II, p. 176.

[181] Fourth report (A/CN.4/177), cited in footnote 166 above, p. 53.

[182] *Yearbook ... 1965*, vol. II, p. 162. Draft article 20 of 1965 became draft article 18, without modification, in the text adopted by the International Law Commission in 1966 (*Yearbook ... 1966*, vol. II, p. 208).

[183] See the Spanish amendment: "A reservation, an acceptance of a reservation, and an objection to a reservation must be formulated in writing and duly communicated by the reserving, accepting or objecting State to the other States which are parties, or are entitled to become parties, to the treaty." (A/CONF.39/C.1/L.149, *United Nations Conference on the Law of Treaties, Documents of the Conference* (A/CONF.39/11/Add.2), cited in footnote 124 above, p. 138.

objection to a reservation during the period of time prescribed by this provision or whether, by default, it must be considered as having accepted the reservation.

98. It seems, therefore, necessary to carry over the first part of article 23, paragraph 1, of the Vienna Conventions in a draft guideline 2.6.7, which would parallel draft guideline 2.1.1.

2.6.7 Written form

An objection must be formulated in writing.

(ii) Expression of intention to oppose the entry into force of a treaty

99. As already noted (see paras. 68-75 above), a State objecting to a reservation may oppose the entry into force of a treaty as between itself and the reserving State. In order for this to be so, according to article 20, paragraph 4 (b), of the Vienna Conventions that intent must still be "definitely expressed by the objecting State or organization".

100. Following the reversal of the presumption regarding the effects of the objection on the entry into force of the treaty as between the reserving State and the objecting State (see paras. 69-72 above), a clear and unequivocal statement is needed in order for the treaty not to enter into force.[184] This is certainly true of the objection of the Netherlands to reservations to article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, which states that "the Government of the Kingdom of the Netherlands ... does not deem any State which has made or will make such reservation a party to the Convention".[185] France also very clearly expressed such an intention regarding the reservation of the United States of America to the Agreement on the International Carriage of Perishable Foodstuffs and on the Special Equipment to be used for such Carriage (ATP), by declaring that it would not "be bound by the ATP Agreement in its relations with the United States of America".[186] Similarly, the United Kingdom stated in its objection to the reservation of the Syrian Arab Republic to the Vienna Convention on the Law of Treaties that it did "not accept the entry into force of the Convention as between the United Kingdom and Syria".[187]

101. On the other hand, the mere fact that the reason for the objection is that the reservation is considered incompatible with the object and purpose of the treaty is not sufficient.[188] Practice is indisputable in this regard, since States quite frequently base their objections on such incompatibility, all the while clarifying that the finding does not prevent the treaty from entering into force as between them and the author

---

[184] See R. Baratta, *Gli effetti della riserve ai trattati* (Milan, A. Giuffrè, 1999), p. 352. The author states: "There is no doubt that in order for the expected consequence of the rule regarding a qualified objection to be produced, the author must state its intention to that effect."

[185] *Multilateral Treaties* ..., cited in footnote 146 above, vol. I, chap. IV.1. See also the objection of Nationalist China (ibid.).

[186] Ibid., vol. I, chap. XI.B.22. See also the objection of Italy, ibid.

[187] Ibid., vol. II, chap. XIII.1. See also the objection of the United Kingdom to the reservation of Viet Nam.

[188] This remark, which concerns only the contents of declarations made pursuant to article 20, paragraph 4 (*b*), of the Vienna Conventions, does not pre-empt the different question of determining whether a reservation incompatible with the object and purpose of a treaty is or is not automatically null and void; that question was examined in the tenth report on reservations (A/CN.4/445/Add.2, paras. 195-200) and will be discussed again in the next report.

of the reservation.[189] The objections of Israel, Italy and the United Kingdom regarding the reservation of Burundi to the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons termed the reservation incompatible with the object and purpose of the Convention. Notwithstanding, the authors of the objections state, somewhat ambiguously, that they would not "consider Burundi as having validly acceded to the Convention until such time as the reservation is withdrawn".[190] This declaration could lead to debate as to the clarity of the intention expressed.

102. Neither the Vienna Conventions nor the *travaux préparatoires* give any useful indication regarding the time at which the objecting State or international organization must clearly express its intention to oppose the entry into force of the treaty as between itself and the reserving State. We can, however, proceed by deduction. According to the presumption of article 20, paragraph 4 (*b*), of the Vienna Conventions, whereby an objection does not preclude the entry into force of a treaty in treaty relations between an objecting State or international organization and the reserving State or international organization unless the contrary is expressly stated, an objection that is not accompanied by such a declaration results in the treaty entering into force, subject to article 21, paragraph 3, of the Vienna Conventions concerning the effect of a reservation on relations between the two parties. If the objecting State or international organization expressed a different intention in a subsequent declaration, it would not only undermine legal security but would also enlarge its objection: a minimum-effect objection would become a maximum-effect objection (see para. 177 below), which, as we shall see, is certainly not possible (see paras. 176-180 below and draft guideline 2.7.9).

103. Therefore, in order effectively to oppose the entry into force of a treaty as between itself and the reserving State, the objecting State must necessarily formulate the declaration provided for in article 20, paragraph 4 (*b*), of the Vienna Conventions at the same time that it formulates the objection. The declaration on the non-entry into force of the treaty in bilateral relations then becomes a specific element of the very content of the maximum-effect objection, of which it must be an integral part.

104. These two conditions — a clear declaration, expressed in the objection itself — limit, then, the freedom of a State or international organization to oppose the entry into force of a treaty (see paras. 68-75 above and draft guideline 2.6.4). They are reflected in draft guideline 2.6.8, which might be worded as follows:

2.6.8 Expression of intention to oppose the entry into force of the treaty

When a State or international organization making an objection to a reservation intends to oppose the entry into force of the treaty as between itself

[189] Among many examples, see the objections of several States members of the Council of Europe to the reservation of Syria to the International Convention for the Suppression of the Financing of Terrorism on the basis of the incompatibility of the reservation with the object and purpose of the Convention (Austria, Belgium, Canada, Denmark, Estonia, Finland, France, Germany, Latvia, Norway, the Netherlands, Portugal, Sweden). *Multilateral Treaties* ..., cited in footnote 146 above, vol. I, chap. XIII.11. In every case it is stated that the objection does not preclude the entry into force of the Convention between objecting State and the Syrian Arab Republic. See also the examples cited in footnote 146 above.

[190] *Multilateral Treaties* ..., vol. II, chap. XVIII.7, p. 124.

and the reserving State or international organization, it must clearly express its intention when it formulates the objection.

(iii) Statement of reasons

105. Despite the link initially established between an objection, on the one hand, and the compatibility of the reservation with the object and purpose of the treaty, on the other hand (see para. 62 above), Sir Humphrey Waldock never at any point envisaged requiring a statement of the reasons for an objection. Neither of the Vienna Conventions contains such a provision. This is highly regrettable.

106. Of course, as explained above (see paras. 60-83), a State or international organization may object to a reservation for any reason whatsoever, irrespective of the validity of the reservation. "No State can be bound by contractual obligations it does not consider suitable".[191] Furthermore, during discussions of the Sixth Committee of the General Assembly, several States indicated that quite often the reasons a State has for formulating an objection are purely political.[192] Since this is the case, stating a reason risks uselessly embarrassing an objecting State or international organization, without any gain to the objecting State or international organization or to the other States or international organizations concerned.

107. But the question is different where a State or international organization objects to a reservation because it considers it invalid (for whatever reason). Leaving aside the possibility that States may have a legal obligation[193] to object to reservations that are incompatible with the object and purpose of a treaty, nevertheless, in a "flexible" treaty regime the objection clearly plays a vital role in the determination of the validity of a reservation. In the absence of a mechanism for reservation control, the onus is on States and international organizations to express, through objections, their view, necessarily subjective, on the validity of a given

---

[191] Christian Tomuschat, cited in footnote 131 above, page 466.

[192] See the statement of the United States representative in the Sixth Committee during the fifty-eighth session of the General Assembly: "Practice demonstrated that States and international organizations objected to reservations for a variety of reasons, often political rather than legal in nature, and with different intentions" (A/C.6/58/SR.20, para. 9). During the sixtieth session, the representative of the Netherlands stated that "in the current system, the political aspect of an objection, namely, the view expressed by the objecting State on the desirability of a reservation, played a central role, and the legal effects of such an objection were becoming increasingly peripheral" (A/C.6/60/SR.14, para. 31); on the political aspect of an objection, see Portugal (A/C.6/60/SR.16, paragraph 44). See also the separate opinion of Judge A. A. Cançado Trinidade in the case of *Caesar v. Trinidad and Tobago*, 11 March 2005, para. 24.

[193] The Netherlands observed that "States parties, as guardians of a particular treaty, appeared to have a moral, if not legal, obligation to object to a reservation that was contrary to the object and purpose of that treaty" (A/C.6/60/SR.16, paragraph 29). According to this line of reasoning, "a party is required to give effect to its undertakings in good faith and that would preclude it from accepting a reservation inconsistent with the object and purpose of the treaty" (Françoise Hampson, final working paper on reservations to human rights treaties (E/CN.4/Sub.2/2004/42), para. 24); Mrs. Hampson observed however that there did not seem to be a general obligation to formulate an objection to incompatible reservations (ibid., paragraph 30); this is also the prima facie position of the Special Rapporteur.

reservation.[194] Such a function can only be fulfilled, however, by objections motivated by considerations regarding the non-validity of the reservation in question. It is difficult to see why an objection formulated for purely political reasons should be taken into account in evaluating the conformity of a reservation with the requirements of article 19 of the Vienna Conventions. Even if only for this reason, it would seem reasonable, even necessary, to indicate to the extent possible the reasons for an objection.

108. In addition, statement of the reasons for an objection not only allows a reserving State or international organization to understand the views of the other States and international organizations concerned regarding the validity of the reservation; it also provides important evidence to the monitoring bodies called on to decide on the conformity of a reservation with the treaty. Thus, in the *Loizidou* case, the European Court of Human Rights found confirmation of its conclusions regarding the reservation of Turkey in the declarations and objections made by other States parties to the European Convention on Human Rights.[195] Similarly, in the working paper she submitted to the Sub-Commission on the Promotion and Protection of Human Rights in 2004, Mrs. Hampson stated that "in order for a treaty body to discharge its role, it will need to examine, amongst other materials, the practice of the parties to the treaty in question with regard to reservations and objections".[196] The Human Rights Committee itself, in its General Comment No. 24, which, while demonstrating deep mistrust with regard to the practice of States concerning objections and with regard to the conclusions that one may draw from it in assessing the validity of a reservation, nevertheless states that "an objection to a reservation made by States may provide some guidance to the Committee in its interpretation as to its compatibility with the object and purpose of the Covenant".[197]

109. State practice shows that States often indicate in their objections not only that they consider the reservation in question contrary to the object and purpose of the Treaty but also, in more or less detail, how and why they reached that conclusion. At the sixtieth session of the General Assembly, the representative of Italy to the Sixth Committee expressed the view that the Commission should encourage States to make use of the formulas set forth in article 19 of the Vienna Convention, with a view to clarifying their objections (A/C.6/60/SR.16, para. 20).

110. In view of these considerations and the absence of an obligation in the Vienna regime to state the reasons for objections, it would seem useful to include in the

---

[194] Some treaty regimes go so far as to rely on the number of objections in order to determine the admissibility of a reservation. See for example article 20, paragraph 2, of the 1966 International Convention on the Elimination of All Forms of Racial Discrimination, which states: "A reservation incompatible with the object and purpose of this Convention shall not be permitted, nor shall a reservation the effect of which would inhibit the operation of any of the bodies established by this Convention be allowed. *A reservation shall be considered incompatible or inhibitive if at least two-thirds of the States Parties to this Convention object to it*" (emphasis added).

[195] *Loizidou v. Turkey, Preliminary Objections, Judgment of 23 March 1995*, Series A, vol. 310, pp. 28-29, paragraph 81. See also the statement of the representative of Sweden on behalf of the Nordic countries, in the Sixth Committee (S/C.6/60/SR.14, para. 22).

[196] Cited in footnote 193 above, para. 28. See more generally, paragraphs 21-35 of this important study.

[197] CCPR/C/21/Rev.1/Add.6, para. 17.

Guide to Practice a draft guideline encouraging States (and international organizations) to expand and develop the practice of stating reasons.[198] However, it must be clearly understood that such a provision would be only a recommendation, a guideline for State practice and would not codify an established rule of international law.[199]

111. The Special Rapporteur is thus proposing draft guideline 2.6.10, which might read as follows:

2.6.10 Statement of reasons

Whenever possible, an objection should indicate the reasons why it is being made.

(b) Confirmation of objections

112. Contrary to what is provided in article 23, paragraph 2, of the Vienna Convention for reservations, [200] an objection does not require formal confirmation by its author if it was made prior to the formal confirmation of the reservation, in accordance with article 23, paragraph 3 of the Vienna Convention, which states:

> "An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation."

113. That provision was only included at a very late stage of the preparatory work for the 1969 Convention. The early draft articles relating to the procedure applicable to the formulation of objections did not refer to cases where an objection might be made to a reservation that had yet to be formally confirmed. It was only in 1966 that the non-requirement of confirmation of an objection was expressed in draft article 18, paragraph 3, adopted on second reading in 1966,[201] without explanation or illustration; however, it was presented at that time as *lex ferenda*.[202]

114. This is doubtless a common sense rule: the formulation of the reservation concerns all States and international organizations that are contracting parties or entitled to become parties; acceptances and objections affect primarily the bilateral relations between the author of a reservation and each of the accepting or objecting States or organizations. The reservation is an "offer" addressed to all contracting

---

[198] This idea was already received favourably by the Commission; see *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), para. 352.

[199] This is not the first guideline constituting a recommendation to appear in the Guide to Practice. See draft guideline 2.5.3 on the periodic review of the usefulness of reservations (ibid., para. 368).

[200] See also draft guideline 2.2.1 (Reservations formulated when signing and formal confirmation): "If formulated when signing the treaty subject to ratification, act of formal confirmation, acceptance or approval, a reservation must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation." For the commentary to this draft guideline, see *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), para. 157.

[201] See *Yearbook ... 1966*, vol. II, p. 208.

[202] "The Commission did not consider that an objection to a reservation made previously to the latter's confirmation would need to be reiterated after that event" (ibid., para. (5) of the commentary).

parties, which may accept or reject it; it is the reserving State or organization that endangers the integrity of the Treaty and risks reducing it to a series of bilateral relations. On the other hand, it is not important whether the acceptance or objection is made before or after the confirmation of the reservation: what is important is that the reserving State or organization is aware of its partners' intentions,[203] which is the case if the communication procedure established in article 23, paragraph 1, has been followed.

115. State practice regarding the confirmation of objections is sparse and inconsistent: sometimes States confirm their previous objections once the reserving State has itself confirmed its reservation but at other times they refrain from doing so.[204] Although the latter approach seems to be more usual, the fact that these confirmations exist does not invalidate the positive quality of the rule laid down in article 23, paragraph 3; they are precautionary measures by no means dictated by a feeling of legal obligation (*opinio juris*).

116. In view of these considerations, it will be sufficient, in the Guide to Practice, to repeat the rule expounded in article 23, paragraph 3, of the Vienna Conventions:

2.6.11 Non-requirement of confirmation of an objection made prior to formal confirmation of a reservation

An objection to a reservation made by a State or an international organization prior to confirmation of the reservation in accordance with draft guideline 2.2.1 does not itself require confirmation.

117. Article 23, paragraph 3, of the Vienna Conventions does not, however, answer the question of whether an objection made by a State or an international organization that, when making it, has yet to express its consent to being bound by the treaty must subsequently be confirmed if it is to produce the effects envisaged. Although Sir Humphrey Waldock did not overlook the possibility that an objection might be formulated by signatory States or by States only entitled to become parties to the treaty,[205] the question of the subsequent confirmation of such a reservation

---

[203] In its Advisory Opinion of 28 May 1951, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, the International Court of Justice described the objection made by a signatory as a "warning" addressed to the author of the reservation (Opinion cited in footnote 89, p. 29). See also paragraphs 119 and 122 below.

[204] For example, Australia and Ecuador did not confirm their objections to the reservations formulated at the time of the signing of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide by the Byelorussian SSR, Czechoslovakia, Ukraine and the Union of Soviet Socialist Republics, when those States ratified that Convention while confirming their reservations (*Multilateral Treaties* ..., footnote 146 above, vol. I, chap. IV.1). Similarly, Ireland and Portugal did not confirm the objections they made to the reservation formulated by Turkey at the time of the signing of the 1989 Convention on the Rights of the Child when Turkey confirmed its reservation in its instrument of ratification (ibid., chap. IV.11). On the other hand, Sweden, which had objected to a reservation Qatar had made to the same Convention, confirmed its objection when Qatar confirmed its reservation at the time of ratification (ibid., notes 15 and 16).

[205] See in particular paragraph 3 (b) of the draft article 19 proposed by Sir Humphrey Waldock in his first report on the law of treaties (A/CN.4/144, cited in footnote 161 above, p. 62) or paragraph 6 of the draft article 20 proposed in his fourth report on the law of treaties (A/CN.4/177, cited in footnote 166 above, p. 53).

was never raised.[206] A proposal in that regard made by Poland at the Vienna Conference[207] was not considered. Accordingly the Convention has a gap that the Commission should endeavour to fill.

118. State practice in this regard is all but non-existent. One of the rare examples is provided by the objections formulated by the United States of America to a number of reservations to the 1969 Vienna Convention itself.[208] In its objection to the Syrian reservation, the United States — which has yet to express its consent to be bound by the Convention — specified that it:

> "intends, at such time as it may become a party to the Vienna Convention on the Law of Treaties, *to reaffirm its objection* to the foregoing reservation and to reject treaty relations with the Syrian Arab Republic under all provisions in Part V of the Convention with regard to which the Syrian Arab Republic has rejected the obligatory conciliation procedures set forth in the Annex to the Convention".[209]

Curiously, the second United States objection, formulated against the Tunisian reservation, does not contain the same statement.

119. In its 1951 Advisory Opinion, the International Court of Justice also seemed to take the view that objections made by non-States parties do not require confirmation. It considered that:

> "Pending ratification, the provisional status created by signature confers upon the signatory a right to formulate as a precautionary measure objections which have themselves a provisional character. These would disappear if the signature were not followed by ratification, *or they would become effective on ratification*.
>
> ...
>
> ... The reserving State would be given notice that as soon as the constitutional or other processes, which cause the lapse of time before ratification, have been completed, it would be confronted with a valid objection which carries full legal effect."[210]

---

[206] Except, perhaps, in a comment made incidentally by Mr. Tunkin, *Yearbook ... 1965*, vol. I, 799th meeting, para. 38: "It was clearly the modern practice that a reservation was valid only if made or confirmed at the moment when final consent to be bound was given, and that was the presumption reflected in the 1962 draft. The same applied to objections to reservations. The point was partially covered in paragraph 6 of the Special Rapporteur's new text for article 20."

[207] Mimeograph A/CONF.39/6/Add.1, p. 18. The Polish Government proposed that paragraph 2 of article 18 (which became article 23), should be worded as follows: "If formulated on the occasion of the adoption of the text or upon signing the treaty subject to ratification, acceptance or approval, a reservation as well as an eventual objection to it must be formally confirmed by the reserving and objecting States when expressing their consent to be bound by the treaty. In such a case the reservation and the objection shall be considered as having been made on the date of their confirmation."

[208] The reservations in question are those formulated by the Syrian Arab Republic (point E) and Tunisia (*Multilateral Treaties ...*, footnote 146 above, vol. II, chap. XXIII.1).

[209] Ibid. (italics added).

[210] Opinion cited in footnote 89 above, pp. 28-29; italics added.

The Court thereby seemed to accept that an objection automatically takes effect as a result of ratification alone, without the need for confirmation.[211] Nonetheless, it has yet to take a formal stand on this question and the debate has been left open.

120. It is possible, however, to deduce from the omission from the text of the Vienna Conventions of any requirement that an objection made by a State or an organization prior to ratification or approval should be confirmed that neither the members of the Commission nor the delegates at the Vienna Conference[212] considered that such a confirmation was necessary. The fact that the Polish amendment,[213] which aimed to bring objections in line with reservations in that respect, was not adopted further confirms this argument. These considerations are further strengthened if one bears in mind that, when the requirement of formal confirmation of reservations formulated when signing the treaty, an obligation now firmly enshrined in article 23, paragraph 2, of the Vienna Conventions, was adopted by the Commission, it was more in the nature of progressive development than codification *stricto sensu*.[214] Therefore, the disparity on this score between the procedural rules laid down for the formulation of reservations, on the one hand, and the formulation of objections, on the other, could not have been due to a simple oversight but could reasonably be considered deliberate.

121. There are other grounds for the non-requirement of formal confirmation of an objection made by a State or an international organization prior to the expression of its consent to be bound by the treaty. Whereas reservations are often considered as "a necessary evil, but still an evil",[215] in that they endanger the integrity of a treaty, objections are merely a reaction open to the other States or international organizations concerned and are aimed at monitoring or restricting, in the absence of a centralized monitoring mechanism, the freedom to formulate reservations. An objection may, of course, produce effects on a treaty that are far from negligible and may possibly even prevent it from entering into force. Yet reservations are undoubtedly the true "evil";[216] it is they that must be restricted not only in substance but also in form, so that the reserving State or international organization can assess the scope of its unilateral declaration. Objections are by no means anodyne, of course: they alone enable the other contracting parties to give their point of view as to the validity or appropriateness of a reservation. From this perspective, formal requirements, provided they are not excessive, may serve to discourage the practice of reservations, insofar as that may be done.

---

[211] See in this sense F. Horn, cited in footnote 131 above, p. 137.

[212] Ibid.

[213] See footnote 207 above.

[214] See Sir Humphrey Waldock's first report (A/CN.4/144), footnote 161 above, p. 66, para. (11) of the commentary to draft article 17; D. W. Greig, "Reservations: Equity as a balancing factor?", *Australian Yearbook of International Law*, 1995, p. 28; F. Horn, footnote 131 above, p. 41. See also the commentary to draft guideline 2.2.1 (Formal confirmation of reservations formulated when signing a treaty), *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), para. 157, pp. 467-468, para. (8) of the commentary.

[215] *Yearbook ... 1965*, vol. I, 797th meeting, para. 38 (R. Ago); see also, J. K. Gamble, Jr., "The 1982 U.N. Convention on the Law of the Sea: a 'midstream' assessment of the effectiveness of article 309", *San Diego Law Review* 1987, p. 628.

[216] The Special Rapporteur does not think that reservations are necessarily an evil in all cases and regardless of circumstances.

122. A reservation formulated before the reserving State or international organization becomes a contracting party to the treaty should produce no legal effect and will remain a "dead letter" until such a time as the State's consent to be bound by the treaty is effectively given. Requiring formal confirmation of the reservation is justified in this case in particular by the fact that the reservation, once accepted, modifies that consent. The same is not true of objections. Although objections, too, only produce the effects provided for in article 20, paragraph 4, and article 21, paragraph 3, of the Vienna Conventions once the objecting State or international organization has become a contracting party, they are not without significance even before then. They express their author's opinion of a reservation's validity or admissibility and, as such, may be taken into consideration by the bodies having competence to assess the validity of reservations (see para. 108 above). Moreover, and on this point the Advisory Opinion of the International Court of Justice remains valid, objections give notice to reserving States with regard to the attitude of the objecting State vis-à-vis their reservation. As the Court observed:

> "The legal interest of a signatory State in objecting to a reservation would thus be amply safeguarded. The reserving State would be given notice that as soon as the constitutional or other processes, which cause the lapse of time before ratification, have been completed, it would be confronted with a valid objection which carries full legal effect and consequently, it would have to decide, when the objection is stated, whether it wishes to maintain or withdraw its reservation."[217]

Such an objection, formulated prior to the expression of consent to be bound by the treaty, therefore encourages the reserving State to reconsider, modify or withdraw its reservation in the same way as an objection raised by a contracting State. This notification would, however, become a mere possibility if the objecting State were required to confirm its objection at the time it expressed its consent to be bound by the treaty. The requirement for an additional formal confirmation would thus, in the view of the Special Rapporteur, largely undermine the significance attaching to the freedom of States and international organizations that are not yet contracting parties to the treaty to raise objections.

123. Moreover, non-confirmation of the objection in such a situation poses no problem of legal security. The objections formulated by a signatory State or by a State entitled to become a party to the treaty must, like any notification or communication relating to the treaty,[218] be made in writing and communicated and notified, in the same way as an objection emanating from a party. Furthermore, unlike a reservation, an objection modifies traditional relations only with respect to the bilateral relations between the reserving State — which has been duly notified — and the objecting State. The rights and obligations assumed by the objecting State vis-à-vis other States parties to the treaty are not affected in any way.

124. In conclusion, one may reasonably consider that the formal confirmation of an objection formulated by a State or an international organization that has not yet expressed its consent to be bound by the treaty is by no means essential. The silence of the Vienna Conventions on this point should, however, be rectified in order to

[217] Opinion cited in footnote 89 above, p. 29.

[218] See article 78 of the 1969 Vienna Convention and article 79 of the 1986 Vienna Convention.

remove any doubts concerning this point. This could be achieved through a draft guideline 2.6.12 worded as follows:

> **2.6.12 Non-requirement of confirmation of an objection made prior to the expression of consent to be bound by a treaty**[219]
>
> If an objection is made prior to the expression of consent to be bound by the treaty, it does not need to be formally confirmed by the objecting State or international organization at the time it expresses its consent to be bound.

(c) Time at which an objection may be raised

125. The question of the time at which and until which a State or an international organization may raise an objection is partially and indirectly addressed by article 20, paragraph 5, of the Vienna Conventions. In its 1986 form, this provision states:

> "For the purposes of paragraphs 2 and 4,[220] and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State or an international organization if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later."

126. It should be noted that the third paragraph of draft guideline 2.1.6 (Procedure for communication of reservations), adopted by the Commission in 2002, draws an express conclusion from this provision with respect to the period of time during which an objection may be raised. According to that paragraph:

> "The period during which an objection to a reservation may be raised starts at the date on which a State or an international organization received notification of the reservation."

127. This stipulation, which appeared neither in the proposals of the Special Rapporteur[221] nor in the report of the Drafting Committee,[222] was added to draft guideline 2.1.6 in plenary meeting, on the basis of a proposal by Mr. Gaja[223] which at the time was well received by the Special Rapporteur.[224] On reflection, however, this reference to the period of time during which an objection may be formulated presents two difficulties:

---

[219] The title of this draft guideline is modelled on that of draft guideline 2.4.4 (Non-requirement of confirmation of interpretive declarations made when signing a treaty).

[220] Paragraph 2 refers to reservations to treaties with limited participation; paragraph 4 establishes the effects of the acceptance of reservations and objections in all cases other than those of reservations expressly authorized by the treaty, with reference to treaties with limited participation and the constituent acts of international organizations.

[221] See A/CN.4/518/Add.2, paras. 153 and 155, containing draft guidelines 2.1.6 and 2.1.8 as proposed by the Special Rapporteur, which provided the basis for the draft guideline 2.1.6 ultimately adopted by the Commission.

[222] See the presentation of the report of the Drafting Committee by Mr. Yamada, A/CN.4/SR.2733, pp. 6-7.

[223] Ibid., p. 11.

[224] Ibid., pp. 11-12.

– First, one might question the logic of including in a draft guideline on the procedure for communicating reservations a rule that concerns not reservations, but objections;[225]

– Second, and this is a matter of greater concern, the third paragraph of the draft guideline, although not inaccurate, is incomplete and could cause confusion: it addresses only (and, moreover, incompletely[226]) the question of the date from which an objection may be formulated (*dies a quo*) but leaves entirely unanswered the question of the *dies a quem*; clearly, the latter cannot be dealt with on the basis of omission, and it is difficult to deal with it in isolation and to determine the date on which the period of time expires without reference to the date on which it commences.[227]

128. That being the case, it appears essential to include in that section of the Guide to Practice a comprehensive draft guideline on the time period for formulating objections; this is the purpose of draft guideline 2.6.13, which might be worded by adhering quite closely to the relevant part of the text of article 20, paragraph 5, of the 1986 Vienna Convention:

2.6.13 Time period for formulating an objection

Unless the treaty otherwise provides, a State or an international organization may formulate an objection to a reservation by the end of a period of 12 months after it is notified of the reservation or by the date on which such State or international organization expresses its consent to be bound by the treaty, whichever is later.

129. It is clear that this draft guideline to a certain degree duplicates the third paragraph of draft guideline 2.1.6, while completing it and removing its ambiguities. There are thus two avenues open to the Commission. On the one hand, it might decide to delete the third paragraph of draft guideline 2.1.6 (and paragraph (24) of the commentary to this provision), which would be consistent but would present the difficulty of reopening a provision already adopted. On the other hand, it might decide to retain both provisions (which are not incompatible but might be confusing

---

225 It should be noted that the very brief commentary which accompanies this provision gives no indication of the reasons that led the Commission to take this decision: "Paragraph 3 *[sic]* of draft guideline 2.1.6 deals with the specific case of the time period for the formulation of an objection to a reservation by a State or an international organization. It is based on the principle embodied in article 20, paragraph 5, of the 1986 Vienna Convention (itself based on the corresponding provision of the 1969 Vienna Convention), which reads: "... unless the treaty otherwise provides, a reservation is considered to have been accepted by a State or an international organization if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later." It should be noted that, in such cases, the date of effect of the notification may differ from one State or organization to another depending on the date of reception (*Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10), para. 103, para. (24) of the commentary to draft guideline 2.1.6). The positions of Mr. Gaja and the Special Rapporteur (footnotes 223 and 224 above), are scarcely more illuminating in this regard: they both limit themselves to a reference to article 20, paragraph 5, of the Vienna Conventions.

226 See below, paras. 130-135, and draft guideline 2.6.14.

227 In any case, the commentary to the third paragraph of draft guideline 2.1.6 (footnote 225 above) refers expressly to article 20, paragraph 5, of the Vienna Conventions, which makes the same point.

if they were both retained) and keep open the option of introducing the necessary consistency by deleting the third paragraph of draft guideline 2.1.6 on second reading of the draft Guide to Practice. The Special Rapporteur will defer to the wisdom of the Commission on this point.

130. Draft guideline 2.6.13, however, provides only a partial response with respect to the date from which an objection to a reservation may be formulated. It does state that the time period during which the objection may be formulated commences when the reservation is notified to the State or international organization that intends to raise an objection, which implies that the objection may be formulated as from that date. But this does not necessarily mean that it may not be made earlier. Similarly, the definition of objections adopted by the Commission in 2005 (see para. 58 above) provides in this regard that a State or an international organization may make an objection "*in response to a reservation to a treaty formulated* by another State or another international organization" (italics added), which seems to suggest that an objection may be made by a State or an international organization only after a reservation has been *formulated*. A priori, this seems quite logical, but this conclusion is probably hasty.

131. State practice demonstrates, in fact, that States also raise objections for "pre-emptive" purposes. Chile, for example, formulated the following objection to the 1969 Vienna Convention on the Law of Treaties:

> "The Republic of Chile formulates an objection to the reservations which have been made or may be made in the future relating to article 62, paragraph 2, of the Convention."[228]

In the same vein, Japan raised the following objection:

> "The Government of Japan objects to any reservation intended to exclude the application, wholly or in part, of the provisions of article 66 and the Annex concerning the obligatory procedures for settlement of disputes and does not consider Japan to be in treaty relations with any State which has formulated or will formulate such reservation, in respect of those provisions of Part V of the Convention regarding which the application of the obligatory procedures mentioned above are to be excluded as a result of the said reservation."[229]

However, in the second part of this objection the Japanese Government noted that the effects of this objection (an intermediate effect[230]) should apply vis-à-vis the Syrian Arab Republic and Tunisia. It went on to reiterate its declaration to make it clear that the same effects should be produced vis-à-vis the German Democratic Republic and the Union of Soviet Socialist Republics, which had formulated reservations similar to those of the Syrian Arab Republic and Tunisia.[231] Other States, for their part, have raised new objections in reaction to every reservation to the same provisions newly formulated by another State party.[232]

---

228 *Multilateral Treaties* ..., footnote 146 above, vol. II, chap. XXIII.1.

229 Ibid.

230 On the "intermediate" effect of an objection, see A/CN.4/535/Add.1, para. 95.

231 *Multilateral Treaties* ..., footnote 146 above, vol. II, chap. XXIII.1.

232 See for example the declarations and objections of Germany, the Netherlands, New Zealand, the United Kingdom and the United States to the comparable reservations of several States to the 1969 Vienna Convention (ibid.).

132. The Japanese objection to the reservations formulated by the Government of Bahrain[233] and the Government of Qatar to the 1961 Vienna Convention on Consular Relations also states that not only are the two reservations specifically concerned not regarded as valid, but that this [Japan's] "position is applicable to any reservations to the same effect to be made in the future by other countries".[234]

133. The objection of Greece regarding the Convention on the Prevention and Punishment of the Crime of Genocide also belongs in the category of advance objections. It states:

> "We further declare that we have not accepted and do not accept any reservation which has already been made or which may hereafter be made by the countries signatory to this instrument or by countries which have acceded or may hereafter accede thereto."[235]

A general objection was also raised by the Netherlands concerning the reservations to article IX of the same convention. Although this objection lists the States that had already made such a reservation, it concludes: "The Government of the Kingdom of the Netherlands therefore does not deem any State which has made or which will make such reservation a party to the Convention." That objection was, however, withdrawn in 1996 with respect to the reservations made by Malaysia and Singapore and, on the same occasion, withdrawn in relation to Hungary, Bulgaria and Mongolia which had, for their part, withdrawn their reservations.[236]

134. State practice is therefore far from uniform in this regard. However, the Special Rapporteur believes that there is nothing to prevent a State or international organization from formulating pre-emptive or precautionary objections, before a reservation has been formulated or, in the case of reservations already formulated, from declaring its opposition, in advance, to any similar or identical reservation. Such objections do not, of course, produce the effects envisaged in article 20, paragraph 4, and article 21, paragraph 3, of the Vienna Conventions,[237] until a corresponding reservation is formulated by another contracting State or contracting organization. This situation is rather similar to that of a reservation formulated by a State or international organization that is a signatory but not yet a party, against which another State or organization raises an objection, for objections of this kind do not require formal confirmation once the reservation is confirmed at the time when the reserving State expresses its consent to be bound by the treaty (see paras. 117-124 and draft guideline 2.6.11 above). A pre-emptive objection constitutes nonetheless notice that its author will not accept certain reservations. As the International Court of Justice noted, such notice safeguards the rights of the objecting State and warns other States intending to formulate a corresponding

---

233 With regard to the reservation formulated by Bahrain on 2 November 1971, the objection of Japan, dated 27 January 1987, must be regarded as late. It is certainly because of the fact that the Japanese objection also concerns the reservation formulated by Qatar on 6 June 1986 that the Secretary-General published it as an "objection" and not as a simple "communication", as is normally the case. This does not, however, prejudge the concrete effects that this late objection might produce.

234 *Multilateral Treaties* ..., footnote 146 above, vol. I, chap. III.3.

235 Ibid., chap. IV.1. Despite this general objection, Greece raised two further objections with regard to the reservation of the United States (ibid.).

236 Ibid.

237 Nor any other effects, assuming other effects to be legally possible.

reservation that such a reservation will be met with an objection (see the passages from the Court's 1951 Advisory Opinion cited in para. 122 above).

135. The question now is whether a separate guideline on this point should be included in the Guide to Practice or whether it is enough to state in the commentary to guideline 2.6.13 on the time period for formulating an objection that the date of notification of the reservation constitutes the *dies a quo* for the calculation of that period but does not necessarily constitute the date from which an objection may be made. The benefits of pre-emptive objections seem sufficient to warrant the adoption of a separate draft guideline enshrining this practice, which might be worded as follows:

> **2.6.14 Pre-emptive objections**
>
> A State or international organization may formulate an objection to a specific potential or future reservation, or to a specific category of such reservations, or exclude the application of the treaty as a whole in its relations with the author of such a potential or future reservation. Such a pre-emptive objection shall not produce the legal effects of an objection until the reservation has actually been formulated and notified.

136. Just as it is possible to formulate an objection in advance, there is nothing to prevent States or international organizations from formulating objections late, in other words after the end of the 12-month period (or any other time period specified by the treaty), or after the expression of consent to be bound in the case of States and international organizations that accede to the treaty after the end of the 12-month period.

137. This practice is far from uncommon. In a study published in 1988, F. Horn found that of 721 objections surveyed, 118 had been formulated late,[238] and this figure has since increased.[239] Many examples can be found[240] relating to human rights treaties,[241] but also to treaties covering subjects as diverse as the law of treaties,[242] the fight against terrorism,[243] the Convention on the Safety of United

---

[238] F. Horn, footnote 131 above, p. 206. See also R. Riquelme Cortado, footnote 148 above, pp. 264-265.

[239] Ibid., p. 265.

[240] The examples cited hereafter are solely cases identified by the Secretary-General and, consequently, notified as "communications". The study is complicated by the fact that, in the collection of multilateral treaties deposited with the Secretary-General, the date indicated is not that of notification but of deposit of the instrument containing the reservation.

[241] See the very comprehensive list drawn up by R. Riquelme Cortado, footnote 148 above, p. 265 (note 316).

[242] Ibid., p. 265 (note 317).

[243] See the late objections to the declaration made by Pakistan (13 August 2002) upon accession to the 1997 International Convention for the Suppression of Terrorist Bombings: Republic of Moldova (6 October 2003), Russian Federation (22 September 2003) and Poland (3 February 2004) (*Multilateral Treaties* ..., footnote 146 above, vol. II, chap. XVIII.9, note 5); or the late objections to the reservations formulated by the following States in regard to the 1999 International Convention for the Suppression of the Financing of Terrorism: reservation by Belgium (17 May 2004): Russian Federation (7 June 2005) and Argentina (22 August 2005); reservation by Jordan (28 August 2003): Belgium (24 September 2004), Russian Federation (1 March 2005), Japan (14 July 2005), Argentina (22 August 2005); reservation by the Democratic People's Republic of Korea (12 November 2001, at the time of signature; as the State did not ratify the Convention, the reservation was not confirmed): Republic of Moldova (6 October 2003), Germany (17 June 2004), Argentina (22 August 2005) (ibid., notes 4, 7 and 8).

Nations and Associated Personnel[244] and the 1998 Rome Statute of the International Criminal Court.[245]

138. This practice should certainly not be condemned. On the contrary, it allows States and international organizations to express — in the form of objections — their views as to the validity of a reservation, even when the reservation was formulated more than 12 months earlier, and this practice has its advantages, even if these late objections do not produce any immediate legal effects. As it happens, the position of the States and international organizations concerned regarding the validity of a reservation is an important element for the interpreting body, whether a monitoring body or international court, to take into consideration when determining the validity of the reservation (see also para. 108 above). Furthermore, an objection, even a late objection, is important in that it may lead to a reservations dialogue.[246]

139. However, it follows from article 20, paragraph 5, of the Vienna Conventions on the Law of Treaties that if a State or international organization has not raised an objection by the end of a period of 12 months following the formulation of the reservation, or by the date on which it expressed its consent to be bound by the treaty, it is considered to have accepted the reservation, with all the consequences that that entails. Without going into details of the effects of tacit acceptance of this kind, which will be developed further in the next report by the Special Rapporteur, suffice it to say that the effect of such acceptance is, in principle, that the treaty enters into force between the reserving State (or international organization) and the State (or organization) considered to have accepted the reservation. This result cannot be called into question by an objection formulated several years after the cut-off date without seriously affecting legal security. The practice of the Secretary-General as the depositary of multilateral treaties confirms this view. The Secretary-

---

[244] See the late objections by Portugal (15 December 2005) in regard to the declaration by Turkey (9 August 2004) (ibid., chap. XVIII.8, note 4).

[245] See the late objections by Ireland (28 July 2003), the United Kingdom (31 July 2003), Denmark (21 August 2003) and Norway (29 August 2003) to the interpretative declaration (considered by objecting States to constitute a prohibited reservation) by Uruguay (28 June 2002) (ibid., chap. XVIII.10, note 7).

[246] Following the late objection by Sweden, Thailand withdrew its reservation in respect of the Convention on the Rights of the Child (*Multilateral Treaties* ..., footnote 146 above, vol. I, chap. IV.11, note 1). With regard to the interpretative declaration of Uruguay in respect of the Rome Statute (see above, footnote 245), Uruguay justified its declaration, in a communication dated 21 July 2003, providing assurance that its interpretative declaration did not constitute a reservation of any kind (ibid., vol. II, chap. XVIII.10, note 7). Roberto Baratta considered that "objections are a tool used not only and not chiefly to express disapproval of the reservation of another and sometimes to point out its incompatibility with further obligations under international law but also and mainly to induce the author of the reservation to reconsider and possibly to withdraw it" (footnote 184 above, pp. 319-320).

General receives late objections and communicates them to the other States and organizations concerned, not as objections but as a "communications".[247]

140. States seem to be aware that a late objection cannot produce the normal effects of an objection made in good time. The Government of the United Kingdom, in its objection (made within the required 12-month period) to the reservation of Rwanda to article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, said that it wished "to place on record that they take the same view [in other words, that they were unable to accept the reservation] of the similar reservation [to that of Rwanda] made by the German Democratic Republic as notified by the circular letter [...] of 25 April 1973".[248] It is clear that the British objection to the reservation of the German Democratic Republic was late. The careful wording of the objection shows that the United Kingdom did not expect it to produce the legal effects of an objection formulated within the period specified by article 20, paragraph 5 of the 1969 Vienna Convention.

141. The communication of 21 January 2002 by the Peruvian Government in relation to a late objection by Austria[249] — only a few days late — concerning its reservation to the 1969 Vienna Convention on the Law of Treaties is particularly interesting:

> "[The Government of Peru refers to the communication made by the Government of Austria relating to the reservation made by Peru upon ratification]. In this document, Member States are informed of a communication from the Government of Austria stating its objection to the reservation entered in respect of the Vienna Convention on the Law of Treaties by the Government of Peru on 14 September 2000 when depositing the corresponding instrument of ratification.
>
> As the [Secretariat] is aware, article 20, paragraph 5, of the Vienna Convention states that a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation (...). The ratification and reservation by Peru in respect of the Vienna Convention were communicated to Member States on 9 November 2000.
>
> Since the communication from the Austrian Government was received by the Secretariat on 14 November 2001 and circulated to Member States on 28 November 2001, the Peruvian Mission is of the view that there is tacit acceptance on the part of the Austrian Government of the reservation entered

---

[247] *Summary of practice* ..., footnote 153 above, para. 213. In *Multilateral Treaties Deposited With the Secretary-General*, however, several examples of late objections are given in the section "Objections". This is the case, for example, for the objection raised by Japan (27 January 1987) to the reservations formulated by Bahrain (2 November 1971) and Qatar (6 June 1986) to the Vienna Convention on Diplomatic Relations. While the objection was very late concerning the reservation made by Bahrain, it was received in good time concerning the reservation made by Qatar; it was no doubt for that reason that the objection was communicated as such, and not simply as a "communication" (*Multilateral Treaties* ..., footnote 146 above, vol. I, chap. III.3). This is also the case for the objection by the United Kingdom (21 November 1975) to the reservation of Rwanda (16 April 1975), which also applies to the reservation of the German Democratic Republic (25 April 1975) (see para. 140 below).

[248] *Multilateral Treaties* ..., footnote 146 above, vol. I, chap. IV.1.

[249] This late objection was notified as a "communication" (ibid., vol. II, chap. XXIII.1, note 18).

by Peru, the 12-month period referred to in article 20, paragraph 5, of the Vienna Convention having elapsed without any objection being raised. The Peruvian Government considers the communication from the Austrian Government as being without legal effect, since it was not submitted in a timely manner."[250]

Although it would appear excessive to consider the Austrian communication as being completely without legal effect, the Peruvian communication shows very clearly that a late objection does not preclude the presumption of acceptance under article 20, paragraph 5, of the Vienna Conventions.

142. It follows from the above that while a late objection may constitute an important element in determining the validity of a reservation, it cannot produce the "normal" effects of an objection envisaged by article 20, paragraph 4 (*b*), and article 21, paragraph 3, of the Vienna Conventions.[251]

143. States should certainly not be discouraged from formulating late objections: quite the opposite. However, it must be stressed that such late objections cannot produce the effects envisaged by the Vienna Conventions. This is how article 20, paragraph 5, of the Vienna Conventions should be understood.

2.6.15 Late objections

An objection to a reservation formulated after the end of the time period specified in guideline 2.6.13 does not produce all the legal effects of an objection that has been made within that time period.

144. The wording of this draft guideline remains sufficiently flexible to allow for the well-established State practice of late objections. It does not prohibit a State or international organization from raising an objection after the end of the specified time period — either 12 months (or any other period provided for by the treaty) after it received notice of the reservation, or after the date on which it expressed its consent to be bound by the treaty, if this is later. However, the word "formulate" is preferable to "make" (see para. 60 above), since a late objection cannot produce the "normal" effects of an objection made within the period specified in article 20, paragraph 5, of the Vienna Conventions, reproduced in guideline 2.6.13 (Time period for formulating an objection). The fact that a late objection cannot produce the "normal" effects of an objection does not mean that it has no effect at all (see para. 138 above).

3. Withdrawal and modification of objections to reservations

145. The question of the withdrawal of objections to reservations, like that of the withdrawal of reservations, is addressed only very cursorily in the Vienna Conventions,[252] which merely provide indications on how objections may be

[250] Ibid.

[251] However, this does not prejudge the question of whether, and how, the reservation presumed to be accepted produces the "normal" effect provided for under article 21, paragraph 1, of the Vienna Conventions. The consent of the other States is not in itself enough to produce this effect; the reservation must also meet the conditions for validity set out in articles 19 and 23 of the Vienna Conventions.

[252] Especially concerning the effects of the withdrawal of reservations. See. R. Szafarz, "Reservations to multilateral treaties", *Polish Yearbook of International Law*, 1970, p. 314.

withdrawn and when such withdrawals become operative. The modification of objections is not addressed at all.

146. Article 22 provides as follows:

> "2. Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.
>
> 3. Unless the treaty otherwise provides, or it is otherwise agreed:
>
> (a) [...]
>
> (b) the withdrawal of a reservation becomes operative in relation to another contracting State only when notice of it has been received by that State."

Article 23, paragraph 4, stipulates how objections may be withdrawn:

> "The withdrawal of a reservation or of an objection to a reservation must be formulated in writing."

147. The Commission has done very little work on the withdrawal of objections. The question is not dealt with at all in the work of the early special rapporteurs; this is hardly surprising, given their advocacy of the traditional theory of unanimity (see para. 88 above), which logically precluded the possibility of an objection being withdrawn. Just as logically, it was the first report by Sir Humphrey Waldock, who favoured the flexible system, which contained the first proposal for a provision concerning the withdrawal of objections to reservations. He proposed the following draft article 19, paragraph 5:

> "A State which has lodged an objection to a reservation shall be free to withdraw it unilaterally, either in whole or in part, at any time. Withdrawal of the objection shall be effected by written notification to the depositary of the instruments relating to the treaty, and failing any such depositary, to every State which is or is entitled to become a party to the treaty".[253]

After major reworking of the provisions on the form and procedure relating to reservations and objections,[254] this draft article — which simply reiterated mutatis mutandis the similar provision on the withdrawal of a reservation[255] — was abandoned, without the reasons for this being clear from the Commission's work. The draft article is found neither in the text adopted on first reading, nor in the Commission's final draft.

148. It was only during the Vienna Conference that the issue of the withdrawal of objections was reintroduced into the text of articles 22 and 23, based on a Hungarian

---

[253] A/CN.4/144, footnote 161 above, p. 62.

[254] See footnote 14 above.

[255] Draft article 17, paragraph 6, provided as follows: "A State which has formulated a reservation is free to withdraw it unilaterally, either in whole or in part, at any time, whether the reservation has been accepted or rejected by the other States concerned. Withdrawal of the reservation shall be effected by written notification to the depositary of instruments relating to the treaty and, failing any such depositary, to every State which is or is entitled to become a party to the treaty." (A/CN.4/144, footnote 161 above, p. 61). The similarity between the two texts was highlighted by Sir Humphrey Waldock, who considered in the commentary on draft article 19, paragraph 5, that the latter provision reflected paragraph 6 of draft article 17 and "[did] not therefore need further explanation." (ibid., p. 68, para. (22) of the commentary).

amendment[256] which realigned the procedure for the withdrawal of objections with that of withdrawal of reservations. As Ms. Bokor-Szegó explained, on behalf of the Hungarian delegation:

> "If a provision on the withdrawal of reservations was included, it was essential that there should also be a reference to the possibility of withdrawing objections to reservations, particularly since that possibility already existed in practice."[257]

The representative of Italy at the Conference also argued in favour of aligning the procedure for the withdrawal of an objection to a reservation with that for the withdrawal of a reservation:

> "The relation between a reservation and an objection to a reservation was the same as that between a claim and a counter-claim. The extinction of a claim, or the withdrawal of a reservation, was counter-balanced by the extinction of a counter-claim or the withdrawal of an objection to a reservation, which was equally a diplomatic and legal procedural stage in treaty-making."[258]

149. However, there is virtually no State practice in this area. F. Horn could only identify one example of a clear, definite withdrawal of an objection.[259] In 1982 the Cuban Government notified the Secretary-General of the withdrawal of objections it had made when ratifying the Convention on the Prevention and Punishment of the Crime of Genocide with respect to the reservations to articles IX and XII formulated by several socialist States.[260]

150. Although the provisions of the Vienna Convention do not go into detail on the issue of withdrawal of objections, it is clear from the *travaux préparatoires* that, in principle, the withdrawal of objections follows the same rules as the withdrawal of reservations, just as the formulation of objections follows the same rules as the formulation of reservations (see paras. 89-92 above). To make the relevant provisions clear and specific, therefore, the draft guidelines already adopted by the Commission on the question of the withdrawal (and modification) of reservations,[261] can be taken as a basis, with the necessary changes to take account of the specific nature of objections. However, this should not be seen in any way as an attempt to revive the theory of parallelism of forms (see A/CN.4/526/Add.2, para. 119); it is not a matter of aligning the procedure for the withdrawal of objections with the procedure for their formulation, but of applying the same rules to the withdrawal of an objection as those applicable to the withdrawal of a reservation. The two acts, of course, have different effects on the life of the treaty and differ in their nature and their addressees. Nevertheless, they are similar enough

---

[256] A/CONF.39/L.18, in *Documents of the Conference* (A/CONF.39/11/Add.2), footnote 124 above, p. 267. The Hungarian amendment was adopted, with a slight modification, by 98 votes to none: *United Nations Conference on the Law of Treaties, Official Records, Second session, Vienna, 9 April-22 May 1969, Summary records of the plenary meetings* (A/CONF.39/11/Add.1), eleventh plenary meeting, para. 41.

[257] Ibid.

[258] Ibid., para. 27.

[259] F. Horn, footnote 131 above, p. 227.

[260] *Multilateral Treaties* ..., footnote 146 above, vol. I, p. 134, chap. IV.1, note 30.

[261] Draft guidelines 2.5.1 to 2.5.11. For the relevant texts and commentaries, see *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), para. 368.

to be governed by comparable formal systems and procedures, as was suggested during the preparatory work for the Vienna Convention.

151. Following the example of the draft guidelines on the withdrawal and modification of reservations, five issues should be addressed concerning, respectively: the form and procedure for withdrawal; the effects of withdrawal; the time at which withdrawal of the objection produces those effects; partial withdrawal; and the possible widening of the scope of the objection.

(a) Form and procedure for withdrawing objections

152. The question of the form for withdrawing an objection is answered in the Vienna Conventions, in particular in article 22, paragraph 2, and article 23, paragraph 4 (see para. 145 above). Neither the possibility of withdrawing an objection at any time nor the requirement that it should be done in written form require further elaboration — the provisions of the Vienna Conventions themselves are sufficient, especially considering that there is virtually no State practice in this regard. The applicable rules should logically be modelled on those relating to the withdrawal of reservations, regarding both the possibility of withdrawing an objection at any time and written form.

153. On the first point, it will be noted, however, that paragraph 1 (relating to the withdrawal of reservations) and paragraph 2 (relating to the withdrawal of objections) of article 22 of the Vienna Conventions are worded differently: whereas paragraph 1 is careful to state, with regard to a reservation, that "the consent of a State which has accepted the reservation is not required for its withdrawal",[262] paragraph 2 does not make the same specification as far as objections are concerned. But this difference should not be interpreted *a contrario*: the reason for the absence of the clause is that, in the latter case, the purely unilateral character of the withdrawal is self-evident. Proof of this, moreover, is that the part of the Hungarian amendment[263] which would have brought the wording of paragraph 2 into line with that of paragraph 1 was set aside at the request of the British delegation,

> "in view of the differing nature of reservations and objections to reservations; the consent of the reserving State was self-evidently not required for the withdrawal of the objection, and an express provision to that effect might suggest that there was some doubt on the point".[264]

This is a convincing rationale for the different wording of the two provisions, which does not need to be revisited.

154. On the other hand, with regard to form, reservations and objections are treated the same way in article 23, paragraph 1, of the Vienna Conventions.

155. In the light of these observations, it therefore seems reasonable in draft guidelines 2.7.1 and 2.7.2 simply to reproduce the rules contained respectively in

---

262 On this point, see draft guideline 2.5.1 and commentary, ibid.

263 A/CONF.39/L.18, footnote 256 above. This amendment resulted in the inclusion of paragraph 2 in article 23 (see *supra*, para. 148).

264 *United Nations Conference on the Law of Treaties, Official Records, Second Session, Vienna, 9 April-22 May 1969, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.70.V.6), p. 38, para. 31.

article 22, paragraph 2, and article 23, paragraph 4, of the Vienna Conventions, without modifying them:

2.7 Withdrawal and modification of objections to reservations

2.7.1 Withdrawal of objections to reservations

Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.

2.7.2 Form of withdrawal of objections to reservations

The withdrawal of an objection to a reservation must be formulated in writing.

156. As for questions relating to the formulation and communication of a withdrawal, none of the provisions contained in either the 1969 or the 1986 Vienna Conventions is useful or specific. The *travaux préparatoires* (see paras. 147-148 above), however, reveal that the procedure for the withdrawal of an objection is identical to that of a reservation. Accordingly, in the Guide to Practice it is sufficient to refer back to the relevant provisions[265] relating to the procedure to be followed

---

[265] In other words, the following draft guidelines:

2.5.4 Formulation of the withdrawal of a reservation at the international level

1. Subject to the usual practices in international organizations which are depositaries of treaties, a person is competent to withdraw a reservation made on behalf of a State or an international organization if:

(*a*) That person produces appropriate full powers for the purposes of that withdrawal; or

(*b*) It appears from practice or other circumstances that it was the intention of the States and international organizations concerned to consider that person as competent for such purposes without having to produce full powers.

2. By virtue of their functions and without having to produce full powers, the following are competent to withdraw a reservation at the international level on behalf of a State:

(*a*) Heads of State, Heads of Government and Ministers for Foreign Affairs;

(*b*) Representatives accredited by States to an international organization or one of its organs, for the purpose of withdrawing a reservation to a treaty adopted by that organization or body;

(*c*) Heads of permanent missions to an international organization, for the purpose of withdrawing a reservation to a treaty concluded between the accrediting States and that organization.

2.5.5 Absence of consequences at the international level of the violation of internal rules regarding the withdrawal of reservations

The determination of the competent body and the procedure to be followed for withdrawing a reservation at the internal level is a matter for the internal law of each State or the relevant rules of each international organization.

A State or an international organization may not invoke the fact that a reservation has been withdrawn in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for the withdrawal of reservations as invalidating the withdrawal.

2.5.6 Communication of withdrawal of a reservation

The procedure for communicating the withdrawal of a reservation follows the rules applicable to the communication of reservations contained in guidelines 2.1.5, 2.1.6 and 2.1.7.

For the commentaries to these draft guidelines, see *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), para. 368.

for withdrawing a reservation, which apply mutatis mutandis to the withdrawal of an objection.[266]

2.7.3 Formulation and communication of the withdrawal of objections to reservations

Guidelines 2.5.4, 2.5.5 and 2.5.6 are applicable mutatis mutandis to the withdrawal of objections to reservations.

(b) Effects of the withdrawal of an objection

157. At the suggestion of the Special Rapporteur (A/CN.4/526/Add.2, para. 152), the Commission considered the effects of the withdrawal of a reservation at the same time that it examined the procedure for withdrawal.[267] Yet, whereas withdrawing a reservation simply restores the integrity of the treaty in its relations between the author of the reservation and the other parties, the effects of withdrawing an objection are likely to be manifold.

158. Without doubt, a State or an international organization which withdraws its objection to a reservation must be considered to have accepted the reservation. This follows implicitly from the presumption of article 20, paragraph 5, of the Vienna Convention, which considers the lack of an objection by a State or an international organization to be an acceptance. Professor Bowett also asserts that "the withdrawal of an objection to a reservation ... becomes equivalent to acceptance of the reservation".[268] It has also been argued that the withdrawal of an objection is a "specific form of the acceptance of the reservation".[269]

159. It is questionable, however, and in any case premature,[270] to maintain that the consequence of withdrawing an objection is that "the reservation has full effect".[271] As it happens, the effects of the withdrawal of an objection, or the resulting "deferred" acceptance, can be manifold and complex, depending on factors relating to the nature not only of the reservation[272] but also of the objection itself:[273]

- If the objection was not accompanied by the definitive declaration provided for in article 20, paragraph 4 (*b*), of the Convention, the reservation produces its "normal" effects as provided for in article 21, paragraph 1;
- If the objection was a "maximum-effect" objection, the treaty enters into effect between the two parties and the reservation produces its full effects in accordance with the provisions of article 21;

---

[266] See footnote 175 above.

[267] See draft guideline 2.5.7 (Effect of withdrawal of a reservation) and the commentary, *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), para. 368.

[268] "Reservations to non-restricted multilateral treaties", *British Yearbook of International Laws*, 1976-1977, p. 88. See also L. Migliorino, "La revoca di riserve e di obiezioni a riserve", *Revista di Diritto internazionale*, 1994, p. 329.

[269] R. Szafarz, footnote 252 above, p. 314.

[270] The question of the effects of reservations, acceptances and objections will be the subject of a later report, as was indicated in the "Provisional outline of the study" (note 7 above).

[271] D. Bowett, footnote 268 above, p. 88.

[272] And its validity or non-validity — but that is a totally different problem.

[273] In this vein, R. Szafarz, footnote 252 above, p. 314, and L. Migliorino, footnote 268 above, p. 329.

– If the objection was a cause precluding the treaty from entering into force between all parties pursuant to article 20, paragraph 2, or with regard to the reserving State in application of article 20, paragraph 4, the treaty enters into force (and the reservation produces its effects).[274]

160. Not only would it therefore seem difficult to adopt a provision covering all the effects of the withdrawal of an objection, owing to the complexity of the question, but it might also pre-empt the future work of the Commission on the effects of a reservation and the acceptance of a reservation. At this stage in the proceedings, then it seems wiser, and in any case sufficient, to note that the withdrawal of an objection to a reservation is equivalent to its acceptance and that a State which has withdrawn its objection must be considered to have accepted the reservation. Such a provision implicitly refers to acceptances and their effects.

2.7.4 Effect of withdrawal of an objection

A State that withdraws an objection formulated earlier against a reservation is considered to have accepted that reservation.

(c) Effective date of withdrawal of an objection

161. The Vienna Conventions contain a very clear provision concerning the time at which the withdrawal of an objection becomes operative. Article 22, paragraph 3 states:

"3. Unless the treaty otherwise provides, or it is otherwise agreed:

(*a*) ...

(*b*) the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State which formulated the reservation."

162. This provision differs from the corresponding rule on the effective date of withdrawal of a reservation in that, in the latter case, the withdrawal becomes operative "in relation to another contracting State only when notice of it has been received by that State". The reasons for this difference in wording can easily be understood. Whereas withdrawing a reservation hypothetically modifies the content of treaty obligations between the reserving State or international organization and all the other contracting States or organizations, in general withdrawing an objection to a reservation modifies only the bilateral treaty relationship between the reserving State or organization and the objecting State or organization. Ms. Bokor-Szegó, the representative of Hungary at the 1969 Vienna Conference, explained the difference in the wording between subparagraph (*a*) and the subparagraph (*b*) proposed by her delegation as follows (see para. 148 above):

"Withdrawal of an objection directly concerned only the objecting State and the reserving State".[275]

---

[274] Numerous other situations are possible, in particular if one accepts the validity of objections with "intermediate" or "super-maximum" effect. For definitions of these notions, see footnotes 283-286 below.

[275] *Summary records* (A/CONF.39/11/Add.1), footnote 255 above, para. 14.

163. However, as indicated earlier in paragraph 159, the effects of withdrawing an objection to a reservation may go beyond this strictly bilateral relationship between the reserving party and the objecting party. All depends on the content and scale of the objection: the result of its withdrawal may even be that a treaty enters into force between all the States and international organizations that ratified it. This occurs in particular when an objection has prevented a treaty from entering into force between the parties to a treaty with limited participation (article 20, paragraph 2) or, a less likely scenario, when the withdrawal of an objection allows the reserving State or international organization to be a party to the treaty in question and thus brings the number of parties up to that required for the treaty's entry into force. Accordingly, it could be questioned whether it is legitimate that the effective date of withdrawal of an objection to a reservation should depend solely on when notice of that withdrawal is given to the reserving State, which is certainly the chief interested party but not necessarily the only one. In the above-mentioned situations, limiting the requirement to give notice in this way means that the other contracting States or organizations are not in a position to determine the exact date when the treaty enters into force.

164. This disadvantage appears to be more theoretical than real, however, since the withdrawal of an objection must be communicated not only to the reserving State but also to all the States and organizations concerned or to the depositary of the treaty, who will transmit the communication.[276]

165. The other disadvantages of the rule setting the effective date at notification of the withdrawal were discussed by the Commission, with regard to reservations, when it adopted draft guideline 2.5.8 (Effective date of withdrawal of a reservation).[277] They concern the immediacy of that effect, on the one hand, and, on the other, the uncertainty facing the author of the withdrawal as to the date notification is received by the State or international organization concerned. The same considerations apply to the withdrawal of an objection, but there they are less problematic.[278] As far as the immediacy of the effect of the withdrawal is concerned, it should be borne in mind that the chief interested party is the author of the reservation, who would like the reservation to produce all its effects on another contracting party: the quicker the objection is withdrawn, the better it is from the author's perspective.

166. In view of these considerations, it does not seem necessary to modify the rule set forth in article 22, paragraph 3 (*b*), of the Vienna Convention. Taking into account the recent practice of the principal depositaries of multilateral treaties and,

---

[276] This follows from draft guideline 2.7.3 and of draft guidelines 2.5.6 (Communication of withdrawal of a reservation) and 2.1.6 (Procedure for communication of reservation), to which it refers. Consequently, the withdrawal of the objection must be communicated "to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty".

[277] See the commentary to draft guideline 2.5.8 (Effective date of withdrawal of a reservation), *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), para. 368.

[278] Ibid., para. (12) of the commentary.

in particular, that of the Secretary-General of the United Nations,[279] who use modern, rapid means of communication to transmit notifications, States and international organizations other than the reserving State or organization should normally receive the notification at the same time as the directly interested party. Consequently, it might be both useful and justifiable simply to reproduce the provision of the Vienna Convention in a draft guideline, while pointing out the problem in the commentary, as was done for the similar rule concerning the withdrawal of a reservation.[280]

167. In accordance with the Commission's practice, a draft guideline should be adopted that reproduces article 22, paragraph 3 (*b*), of the 1986 Vienna Convention, which is more comprehensive than the corresponding 1969 provision in that it takes into account international organizations, without altering the meaning in any way.

2.7.5 Effective date of withdrawal of an objection

Unless the treaty otherwise provides, or it is otherwise agreed, the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State or international organization which formulated the reservation.

168. For the reasons given in the commentary to draft guideline 2.5.9 (Cases in which a reserving State may unilaterally set the effective date of withdrawal of a reservation),[281] another partially analogous draft guideline should be adopted to allow for the situation where the objecting State or international organization unilaterally sets the effective date of withdrawal of its objection. With regard, however, to the case where the objecting State decides to set as the effective date of withdrawal of its objection an earlier date than that on which the reserving State received notification of the withdrawal, a situation corresponding to subparagraph (*b*) of draft guideline 2.5.9,[282] such an approach places the reserving State in a particularly awkward position. The State that has withdrawn its objection is considered as having accepted the reservation, and therefore, in accordance with the provisions of article 21, paragraph 1, it may invoke the effect of the reservation on a reciprocal basis. The reserving State would then have incurred international obligations without being aware of it, and this could seriously undermine legal security in treaty relations. This hypothesis should therefore be omitted from draft guideline 2.7.9, with the consequence that only a date later than the date of notification may be set by an objecting State when withdrawing an objection.

---

[279] See paras. (14) to (18) of the commentary to draft guideline 2.1.6 (Procedure for communication of reservations), ibid., *Fifty-seventh Session, Supplement No. 10* (A/57/10), para. 103. See also Palitha T. B. Kohona, "Some notable developments in the practice of the UN Secretary-General as depository of multilateral treaties: reservations and declarations", *American Journal of International Law*, vol. 99, 2005, pp. 433-450; Palitha T. B. Kohona, "Reservations: discussion of recent developments in the practice of the Secretary-General of the United Nations as depositary of multilateral treaties", *Georgia Journal of International and Comparative Law*, vol. 33, 2004-2005, pp. 415-450.

[280] See draft guideline 2.5.8 and the commentary, *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), para. 368.

[281] Ibid.

[282] Ibid., paras. (4) and (5) of the commentary to draft guideline 2.5.9.

2.7.6 Cases in which an objecting State or international organization may unilaterally set the effective date of withdrawal of an objection to a reservation

The withdrawal of an objection takes effect on the date set by its author where that date is later than the date on which the reserving State received notification of it.

(d) Partial withdrawal of objections and its effects

169. As with the withdrawal of reservations, it is quite conceivable that a State (or international organization) might modify an objection to a reservation by partially withdrawing it:

- In the first place, a State might change an objection with "maximum"[283] (or even "super-maximum"[284]) or intermediate[285] effect into a "normal" or "simple" objection;[286] in such cases, the modified objection will produce the effects foreseen in article 23, paragraph 3. Moving from an objection with maximum effect to a simple objection or one with intermediate effect also brings about the entry into force of the treaty as between the author of the reservation and the author of the objection.[287]

- In the second place, it would appear that there is nothing to prevent a State from "limiting" the actual content of its objection (by accepting certain aspects of reservations that lend themselves to being separated out in such a way)[288] while maintaining its principle; in this case, the relations between the two States are governed by the new formulation of the objection.

170. To the Special Rapporteur's knowledge, no case of such a partial withdrawal of an objection has occurred in State practice. This does not, however, appear to be sufficient grounds for ruling out such a hypothesis. In his first report, Sir Humphrey Waldock expressly provided for the possibility of a partial withdrawal of this kind. Paragraph 5 of draft article 19, which was devoted entirely to objections but

---

[283] An objection with "maximum" effect is an objection in which its author expresses the intention of preventing the treaty from entering into force as between itself and the author of the reservation in accordance with the provisions of article 20, paragraph 4 (*b*), of the Vienna Conventions. See A/CN.4/535/Add.1, para. 95; see also para. 103 above.

[284] An objection with "super-maximum" effect states not only that the reservation to which the objection is made is not valid, but also that, consequently, the treaty applies ipso facto as a whole in the relations between the two States. See A/CN.4/535/Add.1, para. 96.

[285] By making an objection with "intermediate" effect, a State expresses the intention to be associated with the author of the reservation but considers that the exclusion of treaty relations should go beyond what is provided for in article 21, paragraph 3, of the Vienna Conventions. See A/CN.4/535/Add.1, para. 95.

[286] "Normal" or "simple" objections are those with "minimum" effect, as provided for in article 21, paragraph 3, of the Vienna Conventions. See A/CN.4/535/Add.1, para. 95.

[287] If, on the contrary, an objection with "super-maximum" effect were abandoned and replaced by an objection with maximum effect, the treaty would no longer be in force between the States or international organizations concerned; even if an objection with super-maximum effect is held to be valid, that would enlarge the scope of the objection, which is not possible (see below paras. 176-180 and draft guideline 2.7.9).

[288] In some cases, the question of whether, in the latter hypothesis, it is really possible to speak of a "limitation" of this kind is debatable — but neither more nor less than the question of whether modifying a reservation is tantamount to its partial withdrawal.

subsequently disappeared in the light of changes made to the structure of the draft articles (see para. 89 above), states:

> "A State which has lodged an objection to a reservation shall be free to withdraw it unilaterally, either in whole or *in part*, at any time".[289]

The commentaries to this provision[290] presented by the Special Rapporteur offer no explanation of the reasons why he proposed it. Nonetheless, it is noteworthy that this draft article 19, paragraph 5, should again be identical to the corresponding proposal concerning the withdrawal of reservations,[291] as was made explicit in Sir Humphrey's commentary.[292]

171. Although there is no relevant practice, there is certainly no reason to rule out the possibility of an objection being partially withdrawn. Accordingly, the arguments which led the Commission to allow for the possibility of partial withdrawal of reservations[293] may be transposed mutatis mutandis to partial withdrawal of objections, even though in this case the result is not to ensure a more complete application of the provision of the treaty but, on the contrary, to give full effect (or greater effect) to a reservation. Consequently, just as partial withdrawal of a reservation follows the rules applicable to full withdrawal,[294] it would seem that the procedure for the partial withdrawal of an objection should be modelled on that of its total withdrawal.

172. Nevertheless it would be difficult to model a concise definition of what is meant by "the partial withdrawal of an objection" on the provision adopted by the Commission to define the partial withdrawal of a reservation, which, in the terms of draft guideline 2.5.10 "limits the legal effect of the reservation and achieves a more complete application of the provisions of the treaty, or of the treaty as a whole, to the withdrawing State or international organization". As far as the partial withdrawal of an objection is concerned, the difficulty of determining the effects of total withdrawal (see paras. 157-160 above), reveals the scale of the problems: in this case the reservation is not simply accepted; rather, the objecting State or international organization merely wishes to alter slightly the effects of an objection which, in the main, is maintained. Although it is neither possible nor useful to take a position at this stage on the effects of an objection, there is no doubt that they are quite diverse and are (chiefly) felt in the relations between the author of the objection and the author of the reservation — as provided in article 21, paragraph 3, of the Vienna Conventions — but may also have an impact on the treaty itself if, for example, the withdrawal of an objection with "maximum" effect, replaced by a simple objection, enables the treaty to enter into force.

173. In view of this complexity, it is probably wise, and sufficient, to adopt a draft guideline 2.7.7 worded in general terms:

---

[289] A/CN.4/144, footnote 161 above, p. 62 (italics added) — see para. 147 above.

[290] Ibid., p. 68.

[291] See draft article 17, para. 6, ibid., p. 61.

[292] Ibid., p. 68.

[293] See the commentary to draft guideline 2.5.10 (Partial withdrawal of a reservation), *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), para. 368, paras. (11) and (12) of the commentary.

[294] See the second paragraph of draft guideline 2.5.10 (Partial withdrawal of a reservation): "The partial withdrawal of a reservation is subject to the same formal and procedural rules as a total withdrawal and takes effect on the same conditions".

2.7.7 Partial withdrawal of an objection

Unless the treaty provides otherwise, a State or an international organization may partially withdraw an objection to a reservation. The partial withdrawal limits the legal effects of the objection on the treaty relations between the author of the objection and that the author of the reservation or on the treaty as a whole.

The partial withdrawal of an objection is subject to the same formal and procedural rules as a total withdrawal and takes effect on the same conditions.

174. As for the effects of a partial withdrawal, the difficulty of determining them *in abstracto* calls for a guideline sufficiently broad and flexible to cover every possible case that might arise. The wording currently adopted with regard to the effects of the partial withdrawal of a reservation[295] would seem to meet these requirements. The partial withdrawal modifies the initial objection to the extent of the new formulation. The objection therefore continues to produce its effects as specified by the new text.

175. Even less than in the case of the partial withdrawal of reservations should it be possible for other States or international organizations or the reserving State or organization to react to the partial withdrawal of an objection. The objection itself produces its effects regardless of any reaction in accordance with the principle of the freedom of States or international organizations to make objections.[296] If they may make them as they wish, they may also withdraw them or limit their legal effects.

2.7.8 Effect of a partial withdrawal of an objection

The partial withdrawal of an objection modifies the legal effect of the objection to the extent of the new formulation of the objection.

(e) Widening of the scope of an objection to a reservation

176. Neither the Commission's *travaux préparatoires* nor the 1969 and 1986 Vienna Conventions contain provisions or indications on the question of the widening of the scope of an objection previously made by a State or international organization, and there is no State practice in this area.

177. In theory it is conceivable that a State or international organization that has already raised an objection to a reservation may wish to widen the scope of its objection, for example by adding the declaration provided for in article 20, paragraph 4 (*b*) of the Vienna Conventions, thereby transforming it from a simple objection, which does not preclude the entry into force of the treaty as between the objecting and reserving parties, into a qualified objection, which precludes any

---

[295] See draft guideline 2.5.11 (Effect of a partial withdrawal of a reservation):

The partial withdrawal of a reservation modifies the legal effect of the reservation to the extent of the new formulation of the reservation. Any objection made to the reservation continues to have effect as long as its author does not withdraw it, insofar as the objection does not apply exclusively to that part of the reservation which has been withdrawn.

No objection may be made to the reservation resulting from the partial withdrawal, unless that partial withdrawal has a discriminatory effect, *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), para. 368.

[296] See above, paras. 60-67 and draft guideline 2.6.3 (Freedom to make objections).

treaty-based relations between the objecting and reserving parties. This example alone demonstrates the problems of legal security that would result from such an approach. Any hint of an intention to widen or enlarge the scope of an objection to a reservation could seriously undermine the status of the treaty in the bilateral relations between the reserving party and the author of the new objection. Moreover, since in principle the reserving party does not have the right to respond to an objection, to allow the widening of the scope of an objection would amount to exposing the reserving State to the will of the author of the objection, who could change the treaty relations between the two parties at will, at any time.

178. It is therefore easy to understand the lack of State practice, which suggests that States and international organizations consider that the widening of the scope of an objection to a reservation is simply not possible.

179. Other considerations support this conclusion. In its work on reservations, the Commission has already examined the similar issues of the widening of the scope of a reservation[297] and the widening of the scope of a conditional interpretative declaration.[298] In both cases the widening is understood as the late formulation of a new reservation or a new conditional interpretative declaration.[299] However, a State or international organization that withdraws its objection to a reservation is considered to have accepted the reservation (see paras. 157-160 above), which precludes it from subsequently raising another objection against it. Furthermore, because of the presumption contained in article 20, paragraph 5, of the Vienna Conventions, the late formulation of an objection can have no legal effect. Any declaration formulated after the end of the 12-month period, or any other period specified by the treaty in question, is no longer considered as an objection properly speaking but as the renunciation of a prior acceptance, without regard for the commitment entered into with the reserving State,[300] and the practice of the Secretary-General as depositary of multilateral treaties confirms this conclusion.[301]

180. Therefore, it seems necessary to specify firmly in a draft guideline 2.7.9 that it is not possible to widen the scope of an objection to a reservation.

2.7.9 Prohibition against the widening of the scope of an objection to a reservation

A State or international organization which has made an objection to a reservation cannot subsequently widen the scope of that objection.

---

[297] See draft guideline 2.3.5 (Widening of the scope of a reservation) and commentary, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 295.

[298] See draft guideline 2.4.10 (Limitation and widening of the scope of a conditional interpretative declaration) and commentary, ibid.

[299] See the commentary to draft guideline 2.3.5 (Widening of the scope of a reservation), ibid., para. (1) and the commentary to draft guideline 2.4.10 (Limitation and widening of the scope of a conditional interpretative declaration), ibid., para. (1).

[300] See also paras. 136-144 above.

[301] See above, para. 139 and footnote 247.

United Nations A/CN.4/575

General Assembly

Distr.: General
18 August 2006
English
Original: Arabic/English

International Law Commission
Fifty-eighth session
Geneva, 1 May-9 June and
3 July-11 August 2006

Diplomatic protection

Comments and observations received from Governments

Contents

		Page
I.	Introduction	2
II.	Comments and observations received from Governments	2
	Kuwait	2

06-47608 (E) 161106 161106

I. Introduction

In a communication dated 1 August 2006, the Government of Kuwait transmitted a set of comments and observations on the draft articles and commentaries on diplomatic protection, adopted by the International Law Commission, on first reading, at its fifty-sixth session, in 2004.[1] The Commission did not have the opportunity to consider the comments and observations, as they were received after the adoption of the draft articles on second reading.

II. Comments and observations received from Governments

Kuwait

A. The legal nature of diplomatic protection

1. Whenever an ordinary individual is unable to obtain his rights, he induces the State to which he belongs by virtue of his nationality to take up his defence and institute legal action against the State that is at the origin of the internationally wrongful act. Such intervention on the part of the State is known under the rules of State responsibility as "diplomatic protection of nationals abroad".

Such intervention transforms a conflict between an individual and a State into a dispute between sovereign States and removes the individual from the realm of the dispute. He has to wait for the judgment to be rendered in his case at the international level, so that his State may turn over to him what it has obtained in the way of compensation from the State bearing the international responsibility. His State itself, moreover, has been harmed as a result of the insult to its national.

Kuwait therefore concludes that diplomatic protection is part of State responsibility, i.e., one of its main topics, and also an international instrument for the protection of human rights against violations involving a wrongful act by another State or, as decided by the International Law Commission, diplomatic protection is simply one means of protecting human rights (paragraph 84 of the seventh report of the Special Rapporteur (A/CN.4/567)).

2. Waiver of diplomatic protection

On the basis of the considerations referred to in section 1 above, an individual does not have the right to waive the right of his State to protect him, for in such a case he would be waiving a right that is possessed not by him but rather by his State. Furthermore, what is involved here is a human right that has been violated by another State through a wrongful act on its part. Such rights are inalienable and therefore not subject to waiver. Moreover, they belong to jus cogens, which cannot be derogated from by agreement.

[1] See *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 59.

3. Discretionary right of States to exercise diplomatic protection

During its discussion of draft article 2, the International Law Commission decided not to impose any obligation on States to exercise diplomatic protection, in application of the rule taken from international case law that the exercise of such protection is a right of the State, whence it may make use or not make use that right.

4. Exhaustion of local remedies

Exhaustion of local remedies by the injured person as a precondition for the exercise of diplomatic protection is a constant and firmly established rule of customary international law, as affirmed and decided by the International Court of Justice in the *Interhandel* case of 1959.

This rule rests on two considerations, the first of which is respect for the sovereignty of the foreign State in whose territory the individual is living, his subjection to the national jurisdiction of that State and the assumption that such jurisdiction is unbiased and neutral. The second consideration can be summed up in the granting of an opportunity to the State which committed the act to remedy it by the State's own methods and within the framework of its domestic law.

The Commission has dealt with this requirement, which is governed by articles 14, 15 and 16 of the draft.

5. Nationality requirement

Established State practice requires that a nationality link should exist between the individual and the State at two points in time at least: the first is the time of occurrence of the internationally wrongful act and the coming into being of the injury, and the second, the date of official presentation of the claim for protection, either by the diplomatic channel or by way of international jurisdiction.

Exhaustive discussions among States are taking place within the Commission regarding continuity of nationality (draft articles 3 to 10 deal with the question of the existence of nationality, article 5 dealing specifically with continuous nationality) as a fundamental condition for a State's exercise of diplomatic protection.

The most controversial aspects of the continuity of nationality rule pertain to the final date on which the person having suffered the injury must still be a national and to whether, in that regard, it is the date of official presentation of the claim or the date of the final decision on the claim and the rendering of the related judgment that must be taken into account.

A look at the international position on the matter shows that a number of States support the first approach, favouring continuous nationality up to the date on which the claim is presented internationally, whereas there is strong objection to this view on the part of the United States of America, which considers it necessary for nationality to continue to the date of the resolution of the claim.

The United States relies heavily on the decision of the Arbitral Panel of the International Centre for the Settlement of Investment Disputes in the case *The Loewen Group Inc. v. the United States of America*, which ruled that in the language of international law, "there must be continuous national identity from the date of the events giving rise to the claim", which is the date known by the expression "the time

of the occurrence of the injury", "through the date of the resolution of the claim", which is known as the "final date".

Paragraphs 35 to 46 of the seventh report on diplomatic protection

Whatever the opinion may be concerning the said award, on which the United States of America has relied in its position that nationality must continue until the date of resolution of the international claim for diplomatic protection, Kuwait views that position as appropriate and in keeping with legal and practical criteria and sees the wisdom of diplomatic protection itself.

Indeed, it is neither acceptable nor reasonable for a State to continue to shower its diplomatic protection on someone who has lost the nationality whereby he belonged to it, not to mention the fact that diplomatic protection, as we have stated, rests on two considerations, namely the right of the State and the right of the person offended against by the internationally wrongful act. In the event that the latter's nationality ends, the right of the State to continue its diplomatic protection ceases, for the person is no longer its national. What is more, such protection represents an international claim forbidden to individuals by virtue of the fact that they are not international persons, who alone have the right to institute proceedings of that kind.

As to the argument that such continuity is not necessary, on the grounds that the new State to which the injured person will belong will exercise diplomatic protection on his behalf, this does not weaken, but rather strengthens, the view that continuity of nationality is necessary, if one considers that the new State will resume the prosecution of the international action for diplomatic protection. The matter is different during the period between the injured person's loss of the nationality of his original State and his acquisition of the nationality of another State. Such is also the case when the new State fails to afford diplomatic protection to an injured person who has acquired its citizenship, inasmuch as the exercise of the right of diplomatic protection — as previously pointed out — is a discretionary right of the State, i.e., one that it may, at its option, either exercise or refrain from exercising.

With regard to the above presentation and examination of the legal nature of diplomatic protection, it is Kuwait's intention — in addition to making its contribution to this international effort — that these principles should have an impact on the draft articles being prepared by the United Nations International Law Commission.

B. Draft articles

The proposed draft includes 19 articles whereby the International Law Commission, at its fifty-eighth session, regulated some aspects of diplomatic protection in international law, namely nationality and the exhaustion of local remedies. It did not, however, take up the primary rules of diplomatic protection, i.e., the rules governing the treatment of aliens; nor did it deal with the consequences arising from diplomatic protection, such as the question of determining whether there is an obligation on the successful claimant State to pay over any compensation it may have received in respect of the claim to the injured national. This is a question that is taken up in the concluding part of the seventh report.

Kuwait will now take up the draft articles in succession, in accordance with the following points:

1. **Article 1**

The first paragraph of the proposed amended version of the article defines "diplomatic protection". The second paragraph refers to the distinction between diplomatic protection and consular assistance, stating that the former should not be interpreted as including the exercise of the latter, based on the considerations propounded in the seventh report, i.e., correct theoretical and practical considerations to which we refer the reader in the interest of conciseness and to avoid repetition.

2. **Article 2**

The text of this article, after being amended, affirms the right of the State to exercise diplomatic protection in accordance with the provisions of the draft articles.

In this regard, we refer the reader to the observations made above by Kuwait concerning the State's right to exercise such protection as one of the aspects of the legal nature of diplomatic protection.

3. **Articles 3 to 8**

These articles govern the provision of protection by the State of nationality to natural persons, including multiple nationals, as well as to stateless persons and refugees.

Kuwait considers that article 4 should be redrafted to include the expression "determined by the law of the State", inasmuch as questions of nationality still belong exclusively to States.

Concerning the continuous nationality rule (draft article 5), we refer the reader to the remarks made above in that regard, in connection with the discussion of the legal nature of diplomatic protection.

Apart from these points, Kuwait agrees with the drafts of the said articles worked out by the Commission.

4. **Articles 9 and 10**

Draft articles 9 and 10 govern aspects of diplomatic protection for legal persons relating respectively to the State of nationality of a corporation and continuous nationality of a corporation.

(a) Article 9: State of nationality of a corporation

Kuwait agrees with the wording of article 9 following the proposed amendment of its second paragraph and the deletion of the phrase "or some similar connection" appearing at the end of the paragraph, so that it reads as follows:

> **For the purposes of diplomatic protection of corporations, the State of nationality means the State under whose law the corporation was**

formed and in whose territory it has its registered office or the seat of its management,

on the grounds that the said phrase, if included in the paragraph, would open the door wide to various interpretations and give rise to confusion regarding its construction, apart from being obscure and lacking precision.

(b) Article 10: Continuous nationality of a corporation

The wording of paragraph 2 of this article (paragraph 3 of revised article 10) reads as follows:

Notwithstanding paragraph 1, a State continues to be entitled to exercise diplomatic protection in respect of a corporation which was its national at the time of the injury and which, as the result of the injury, has ceased to exist according to the law of that State.

The word "exist", included in the text, may be imprecise and give rise to numerous difficulties and problems of interpretation inasmuch as established practice has it, according to the rules in force in most (civilized) States regarding the continued existence of corporations or the cessation thereof, that the corporation's legal personality continues to exist even after the corporation's dissolution — either by consent or by decree — until the satisfaction of all creditors' claims, either in full or, in the case of insufficient assets, in part, and in accordance with the details laid out in the legal rules governing the liquidation of corporations.

Kuwait therefore proposes amending the phrase "and which, as the result of the injury, has ceased to exist according to the law of that State" to read "and which, as the result of the injury, no longer has legal personality and has been totally liquidated, according to the law of that State".

5. Article 11

With regard to the phrase "The corporation has ceased to exist", which appears in the text both before and after revision, Kuwait refers the reader to its previous comments concerning the existence of the corporation and proposes that the text be redrafted, with the phrase "The corporation has been liquidated and its legal personality has lapsed" substituted for the aforementioned existing phrase.

6. Article 18

Kuwait proposes substituting the phrase "bilateral and multilateral treaties" for the phrase "special treaty provisions", with a view to clearly defining the meaning and in accordance with the notion of treaties.

7. The right of the injured national to receive compensation adjudged

The established principle on which international practice used to be based required that international reparation for injury was always owed to the State and not to the individual, even in the case of compensation and despite the fact that the amount of compensation must be determined on the basis of the damage suffered by the individual. In modern times, however, this principle has come under examination in many States, which acknowledge that there is some obligation on them to disburse compensation received to the injured national and that the injured

individual in whose interest the claim was raised should benefit from the exercise of diplomatic protection.

Considerations of equity and respect for human rights have compelled the Commission seriously to contemplate adopting a provision on this subject as an exercise in progressive development and thus removing one of the major sources of inequity of diplomatic protection. It has thus drafted language, with which Kuwait agrees, calling for the transfer of the sum turned over to it by way of compensation for the injury in fulfilment of a claim arising out of diplomatic protection to the national in respect of whom it has brought the claim, after deduction of the costs incurred by the State in so doing.